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Supreme Court of the United States

OCTOBER TERM 1969

ARIZONA CORPORATION COMMISSION, *et al.*,
Appellants,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

No. 480

UNION PACIFIC RAILROAD COMPANY, *et al.*,
Appellants,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

No.

On Appeal from the United States District Court for the District of Nebraska

JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

Names and addresses of counsel printed inside front cover

Attorneys for Arizona Corporation Commission, *et al.*

LEE JOHNSON
Attorney General of Oregon

RICHARD W. SABIN
Assistant Attorney General of Oregon
103 Public Service Building
Salem, Oregon 97310

CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509

Attorneys for Union Pacific Railroad Company, *et al.*

R. AMES
M. S. GASSELL
C. T. COOMES
W. W. DALTON
K. A. DOBBINS
J. H. DURKIN
R. M. GLEASON
A. W. LAISY
N. MELVIN
T. A. MILLER
B. D. OLSEN
C. H. PETERSON
H. E. ROOS
A. B. RUSS, JR.
R. D. SICKLER
E. L. VAN DELLEN
R. W. YOST
S. R. BRITTINGHAM, JR.
Of Counsel

RAYMOND E. MCGRATH
1414 First National Bank Building
Omaha, Nebraska 68102

HOWARD J. TRIENENS
MARTIN M. LUCENTE
GEORGE L. SAUNDERS, JR.
R. EDEN MARTIN
11 South La Salle Street
Chicago, Illinois 60603

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Appendix A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY, et al.,
Plaintiffs

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants

CIVIL 02981
JUDGMENT

THIS CAUSE came on for final hearing on the complaint herein praying for a judgment setting aside the order of the Interstate Commerce Commission entered January 17, 1968. Pursuant to Section 2284[1], Title 28, United States Code, the Honorable Donald P. Lay, United States Circuit Judge, and the Honorable Richard E. Robinson, Chief Judge of the United States District Court for the District of Nebraska, were designated to hear and determine this cause with the Honorable Robert Van Pelt, United States District Judge for the District of Nebraska.

The Court having heard the arguments of counsel and the briefs submitted, and it appearing to the Court that the complaint should be dismissed for the reasons set forth in the separate memorandum of the Court heretofore filed herein,

IT IS ORDERED, ADJUDGED and DECREED that the plaintiffs' complaint should be and the same hereby is dismissed.

Dated this 27th day of May, 1969.

/s/ Donald P. Lay
United States Circuit Judge

/s/ Richard E. Robinson
Chief Judge,
United States District Court

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY, et al., **Plaintiffs**	
VS.	**CIVIL 02981**
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, **Defendants**	

MEMORANDUM

APPEARANCES: For Plaintiffs—Raymond E. McGrath, Esq. of McGrath, North, Nelson & Shkolnick, 1444 First Natl. Bank Bldg., Omaha, Nebr., and Howard J. Trieners, Esq. of Sidley & Austin, 11 South LaSalle Street, Chicago, Illinois.

For Twenty-two intervening States—Gerald Vitamvas, Deputy Attorney General for the State of Nebraska and Richard W. Sabin, Esq., Assistant Attorney General, State of Oregon, Salem, Oregon.

For Defendants—William Tighe, Assistant United States Attorney for the District of Nebraska and Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington, D.C.

For Penn Central Company—Harry Otis, Esq. of Gaines, Spittler, Neely, Otis & Moore, 1028 City Natl. Bank Bldg., Omaha, Nebr., and Richard R. Bongartz, Esq., 6 Penn Center Plaza, Philadelphia, Pennsylvania.

For Chicago & Northwestern Railroad Company, Harry Otis, Esq. and John C. Danielson, Esq., 400 West Madison Street, Chicago, Ill.

For Southern Railroad Systems William J. Brennan Jr., of Fitzgerald, Brown, Leahy McGill & Strom, Omaha, Neb. and David G. McDonald, Esq., 1000 Sixteenth Street, N.W. Washington, D.C.

For Milwaukee Railroad Stephen G. Olson, Esq. of Fraser, Stryker, Marshall & Veach, Omaha, Neb. and General Solicitor Raymond K. Merrill, 888 Union Station Bldg., Chicago, Illinois.

Before LAY, Circuit Judge, and ROBINSON and VAN PELT, District Judges.

ROBINSON, District Judge.

This is an action to set aside an order of the Interstate Commerce Commission prescribing rental rates to be paid by railroads for the use of freight cars owned by another railroad. The Commission's order dated January 17, 1968, was entered in its Dockets No. 31358, 33145 and 34405, *Chicago Burlington & Quincy R. Co. et al. v. New York, Susquehanna & Western Railroad Co. et al.*, 332 I.C.C. 176. The plaintiff railroads seek relief because of alleged violations of the Interstate Commerce Act and the Administrative Procedure Act.

This Court has jurisdiction under the statutory authority provided in 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, and 5 U.S.C. §§ 701-706, inclusive. The venue

requirements of 28 U.S.C. § 1398 have been observed as the principal offices of one of the plaintiffs, Union Pacific Railroad Company, are located in the District of Nebraska.

The order of the Commission prescribing the basis of the rates to be paid by railroads for the use of freight cars owned by another railroad was to take effect on October 1, 1968. The date was extended to November 15, 1968, by an order of the Commission. On November 7, 1968, this Court entered an order enjoining the enforcement of the Commission's order during the pendency of this litigation.

For more than 60 years railroads have paid for the use of another railroad's freight cars on the basis of a per diem rate. The level of this rate has been set by the Association of American Railroads or its predecessor organizations. Prior to 1953 the determination of the per diem rate was voluntarily accepted by the railroads. In that year, however, when the per diem rate was raised from $2.00 to $2.40, several Eastern railroads refused to pay the increased amount. They have continued to use the cars of other railroads, but insist on per diem rates which are less than are being paid and collected by all the major railroads.

A number of railroads filed a complaint with the Commission against the dissenting group of railroads, seeking a declaration that the new rates of the Association of American Railroads were just and reasonable and an order requiring all railroads to observe them. Following the filing of the complaint with the Commission, more than 100 private lawsuits were initiated in the United States District Court for the Southern District of New York. Two actions were filed in the New York State Courts. These suits were brought to collect from the dissenting railroads the increased amounts of per diem which they have refused to pay. A few of the suits have been settled, but most have

been held in abeyance pending a decision by the Commission on per diem rates.

In 1955 the Commission issued its decision that the Association of American Railroads per diem rates [$1.75 and $2.00 per day during different past periods and the then existing $2.40 per day] were just and reasonable and that uniform per diem rates for all railroads were required. *Chicago, R. & Q. R. Co. v. New York, S. & W. R. Co.*, 297 I.C.C. 291 [1955].

On review, however, the Commission's decision was reversed by the United States District Court for the District of Massachusetts. With specific reference to the issues relevant here, the court found: [1] a need to more accurately determine car-line costs; [2] a need to collect data and to consider mileage as a possible second factor with time for allocation of per diem costs; [3] an error in using car age as a factor in computing car utilization; and [4] a possible impropriety in the use of reproduction value in place of ledger value in computing depreciation and return on investment for per diem purposes. *Boston & Maine R. Co. v. United States*, 358 U.S. 68 [1958].

The Supreme Court noted that the reviewing court "pointed out that the Commission had erred in considering the repairs, depreciation and 'car day divisor' components of the per diem," but that "it rested [its] decision on the Commission's summary rejections of an alternative method of compensation, which would introduce a mileage factor into the per diem, advocated by certain of the terminal roads." The Supreme Court also noted that the Commission had indicated that further investigation and more detailed findings would be required to comply with the reviewing court's opinion, and recognized that "[s]hould such proceedings lead the Commission to reconsider its estimate of

involved in owning and maintaining freight cars, including a fair return on value [which return shall be fixed at such level as in the Commission's judgment will encourage the acquisition and maintenance or an adequate car fleet] or ***." In the House substitute the language became: "determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such types of freight car, including a fair return on value or ***." The word "solely" was inserted and the parenthetical statement of the original Senate Bill was eliminated. The parenthetical language would have broadened the Commission's power to set compensation in the ordinary sense by including an incentive element, which the insertion in the House bill of the word "solely" clearly precluded.

The alternative power relative to providing incentive compensation was also described differently in the two versions. In the original Senate bill the language read: "or should be computed on the basis of elements reflecting the value of use of freight cars, or upon such other basis or combination of bases as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." In the House substitute version, this language was changed to read: "or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices [including efficient utilization and distribution of cars] and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

It is clear that in the original Senate version the Commission was given the choice of using ordinary cost elements with a "return" factor described to encourage improvement in the car supply or a completely different basis described as "value of use or such basis or combination of bases as the Commission might choose." In the form the bill was passed by the Senate the Commission would have authority to select the basis to be used, subject only to the defined objectives. The House substitute version left undisturbed the standards under existing law by which compensation is to be generally fixed for all cars and limited the determination and application of the incentive element as an additive to the basic rates on specific types of cars found to be in short supply.

The legislative history supports the foregoing analysis. House Report No. 1283 on S. 1098, as amended, contains this statement:

> "If the committee amendment is enacted, the Commission in fixing compensation under existing Section 1[14][a] of the Interstate Commerce Act will be empowered, in the same proceeding, to go beyond the basis of elements of ownership expense in computing compensation. Where warranted consideration may be given as to whether such compensation should be increased by an incentive element or elements which will encourage acquisition and maintenance of an adequate car supply. This will be a discretionary power but the Commission will not be allowed to make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate."

Congressman Staggers, Chairman of the House Commerce Committee and floor manager of the bill, gave the following explanation of the Committee substitute:

> "The committee amendment to the Senate bill sharpens up the authority given to, and the standards to be em-

ployed by, the Commission in determining these per diem charges.

"The amendment first restates in clear language what the courts have held to be the limitations of the law as it is now written. The commission in establishing the compensation to be paid under terms of any contract or arrangement for the use of a type freight car shall compute this compensation on the basis of arrangements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value.

* * *

"Second the amendment gives the Commission the discretionary power to increase this compensation by an incentive element to encourage the acquisition of an adequate supply of freight cars but it gives such power only by type of freight car, and the Commission is not allowed to make any incentive element applicable to any type of freight car, the supply of which the Commission finds too adequate.

* * *

"In the third place, the committee amendment provides that the Commission would be empowered in its discretion to exempt from the incentive element provision any group of carriers where the Commission finds such exemption to be in the national interest. This provision enables the Commission to make exemptions from paying an incentive element by class of carrier, and permits the Commission to consider the several factors specifically authorized in the Senate bill.

"The Committee amendment strikes the provision in the Senate bill which would have allowed the Commission to consider the element of value of use of the freight car as the committee was not at all in sympathy with this proposal nor believed that it was workable.

"Determination of the value of use of the car; namely, what the owning road might have received in terms of revenue from the car had it had the car on its own line

> instead of being on a foreign carrier is so conjectural and questionable as to be impracticable and essentially is an approach to the problem through penalties rather than through incentive." 112 Cong. Record 9945-9946.

Congressman Springer, also a member of the House Commerce Committee, emphasized the significance of the substitute language:

> "The Senate in 1965 passed out a bill. It is the same bill that your committee brings to you today and we are not going to quarrel with what the other body did on this matter. We, I think, today can work out our differences on this when we go to conference.
>
> "If some of you will look at the bill, S. 1098, that was the Senate bill that we considered. We added a committee amendment and rewrote a good part of that into what is the House version—you will see that we made some really important changes. The Senate passed that bill last year and we passed our version of S. 1098 on October 20, 1965." 112 Cong. Record 9947.

It is quite clear that while the Senate Commerce Committee originally intended to make its incentive bill applicable to all car types and to change the existing basis for determining basic per diem compensation, this proposal was rejected by the House and never became law. There was no conference on the variances between the Senate and House passed bills. The Senate agreed to the House amendments so the bill in the form passed by the House prevailed. Our reading of that language and its legislative history leads us to conclude that, while providing incentive additives for freight cars, the Congress reconfirmed the principle of no more than compensation per diem for the car fleet generally. The additives were restricted to those car types the Commission may find to be needed and in short supply.

The plaintiff railroads further contend that the Commission should have reopened the Dockets No. 31358 and 33145 proceeding and considered car supply factors there rather than in a separate proceeding. We find no requirement or reason compelling such action. We have already observed that such consideration would not have changed the basic per diem rates prescribed since they must rest on cost without incentive factors. Moreover, when the amendment to Section 1[14][a] of the Interstate Commerce Act was passed, the basic per diem proceeding had been pending before the Commission for more than 13 years. The Commission and the railroads had spent nearly four years in refixing [*sic*] car costs and providing time and mileage separations following the ruling in *Boston & Maine R. Co.* v. *United States*, supra. The dispute over basic per diem rates—applicable to all cars—was on the threshold of decision.

The Commission did give consideration to car supply factors before deciding to prescribe only a basic per diem rate in the present order. Less than a month after the statute was amended, the Commission instituted a proceeding to determine appropriate incentive per diem charges. *Incentive Per Diem Charges*, supra. All railroads in the United States were made parties to the *Incentive* proceeding. The Commission gave full consideration to all factors specified in the amendment and concluded that the evidence did not warrant the imposition of an incentive charge at this time. There was no question that the proceeding was initiated in response to the passage of the amendment. The Commission stated this clearly:

> "Public Law 89-430 of the 89th Congress amended section 1[14][a] of the Interstate Commerce Act by adding a provision which requires us in exercising our authority to fix compensation to be paid for the use

> of any freight car not owned by the carrier using it, to give consideration to the national level of ownership or such type of freight car and to other factors affecting the adequacy of the national freight car supply and, on the basis of such consideration, determine whether compensation computed solely on the basis of elements of ownership expense should be increased by an incentive element. This investigation was instituted on our own motion on June 23, 1966 to *determine whether information presently available warranted the establishment of an incentive element increase on an interim basis, to apply pending* further study and investigation. [footnote omitted] [emphasis added]." 332 I.C.C. 11 p. 12.

After discussing the evidence adduced and the representations filed by the parties, the Commission concluded:

> "Despite participation by 289 of the Nation's railroads, the investigation produced no reliable information respecting the quantum of interim incentive charge necessary to meet the statutory standards and we conclude that the information necessary to this decision is not *presently* available. Conclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program. They cannot be founded in conjecture and this Commission will not risk the stability and effectiveness of the railroad industry by exercising its authority capriciously." 332 I.C.C. 11, pp. 16-17.

Further investigation in the incentive per diem proceeding is in process. As the Commission noted:

> "The Commission therefore has embarked on an investigatory-research program which will use sampling procedures developed and administered by our staff to provide current data on valid car orders and the available supply of operative cars to meet actual needs.

> Other studies will involve financial and investment analysis relevant to the quantum of the incentive charge. In addition, plans have been made in cooperation with the Department of Transportation for development of standards and specifications for data systems which will provide information as to the manner and volume in which commodities flow in commerce. This will include a detailed survey of user requirements for data covering, among many other factors, equipment used, routes, origins, destinations, stations, distances, rate groups and commodities. We also note that many of the respondents individually are engaged in market and traffic studies which, together with data accumulated by the Association of American Railroads and the Association of Short Line Railroads, can be expected to produce relevant information." 332 I.C.C. 11, p. 18.

The use of a separate proceeding for an incentive per diem inquiry is reasonable and constitutes an appropriate means of implementing the statutory amendment. The amendment does not specify a joint hearing. The two determinations involve collections of different data and evaluations by different statutory standards. The application of the compensatory per diem rate is to all cars, therefore involving all car owners and all car users; the application of incentive per diem limited to cars found to be in short supply affects less than all owners and users. The Commission found in its interim report in the *Incentive* proceeding that the statistical information necessary for a meaningful decision does not presently exist and must be compiled through the efforts of the government and the railroads. The information on which it would make a decision on basic per diem, on the other hand, was already assembled. The basic per diem issue had been pending for an enormous period of time and the outcome of numerous private lawsuits was dependent upon its resolution. To

have reopened the basic per diem proceeding necessarily would have delayed such a decision. Under such circumstances, the Commission's decision to issue its basic per diem decision without awaiting the completion of investigation of incentive per diem, which bears no direct relation to its prescription of basic per diem, was reasonable and appropriate. The separate proceedings method in any event is not an abuse of administrative discretion. Cr. [*sic*], *American Commercial Lines* v. *Louisville & Danville R. Co.* [*sic*], 392 U.S. 571 [1968].

It is appropriate to indicate that the Congress was aware that a determination of incentive charges was likely to require a lengthy Commission proceeding. There is nothing in the legislative history which suggests that the Congress intended to prohibit the Commission from carrying out its responsibilities in the area of basic per diem until it had completed the *Incentive* proceeding.

Furthermore, when the Commission instituted the *Incentive* proceeding following the enactment of the amendment, many of the plaintiff railroads urged that no decision be reached until the Commission had first prescribed the basic per diem rates. At that time at least there was little question among some of the plaintiff railroads that the basic per diem rate should be decided first.

The Congressional purpose is accomplished if the Commission in setting per diem rates, has considered car supply factors by types of cars and, to the extent indicated by those considerations, it exercises its discretionary power to add an incentive per diem to the basic per diem charge. Such consideration may be contemporaneous or, because of the need for extended additional investigation, may follow the determination and prescription of the basic per diem rates. Such consideration may occur in the same proceeding

in which the basic per diem rates are being measured and prescribed or, because of the different statutory standards employed, may occur in a different proceeding. The Commission found persuasive reasons to issue its basic per diem report and order now and to continue its investigation in a separate incentive proceeding. The Commission's approach to this complex and long pending problem is an appropriate exercise of its discretion which this Court should not disturb.

The plaintiff railroads challenged the Commission's resolution of two accounting issues. The Commission found that per diem rates should reflect both time and mileage factors as opposed to a time factor alone and that the cost base of a car, upon which the per diem is computed, should be determined by a formula which provides different treatment for those elements of expense actually incurred by the owner at the time of purchase and those elements reflecting deferred expenses incurred through borrowing. The plaintiffs also contend that certain findings of the Commission are not supported by any evidence.

Per diem has for years been based solely upon the number of days a car was used by a railroad, without regard to the mileage travelled by the car during those days. This method of computing per diem was criticized in *Boston & Maine R. Co.* v. *United States*, supra. On remand, an extensive record was compiled. The Commission concluded that a formula should be presented under which "per diem rates shall be separately calculated, assessed and paid with respect to the number of days cars are held on time [*sic*] and with respect to the number of miles such cars are moved by users in time-haul [*sic*] service." *Chicago B. & Q. R.R. Co.* v. *New York S. & Western R. Co.*, supra, p. 231. The Commission found that 50 percent of the annual repair and maintenance costs should be distributed among car users in

relation to line-haul miles over which they move such cars and 40 percent of the loss in value is allocated to the effect of line-haul mileage and should be so distributed among car users, with the remainder in both instances assigned to time. The time and mileage rates prescribed by the Commission reflected these separations.

The plaintiff railroads do not dispute the Commission's findings that the time and mileage rates prescribed are necessary to effect equitable distribution of car ownership costs among car users, but contend that such rates, adopted without regard to the incentive elements of the amendment to Section 1[14][a] of the Interstate Commerce Act make the car supply problem more severe. In other words, their objection to the Commission's decision is that it did not prescribe rates with a view towards increasing the car supply.

This Court has previously observed that the function of basic per diem is to compensate the owner of a car for the expenses of ownership and maintenance. Car supply factors have no relevance to the computation of such per diem. The Commission's findings that both time and mileage factors should be taken into consideration in the computation of basic per diem and the amount of such ownership costs which should be attributed to each factor are fully supported by the record and represent a sound exercise of its administrative function.

The plaintiff railroads placed great stress on the argument that the effect of the Commission's order prescribing time/mileage rates would defeat the Congressional purpose in passing the amendment because it would reduce substantially the rate which a car using railroad is required to pay to hold a car on its sidings inasmuch as the time portion of the time/mileage rates are [*sic*] less than the present

time only rates. Two relevant considerations come into play in this regard. An incentive per diem may be added to those car types found to be in short supply when the information necessary to make such a finding is available. And, short of that determination, if any railroad is in fact leaving cars sitting unused on a siding, the Commission has ample power under Section 15[1] [*sic*] of the Interstate Commerce Act to issue a car service order, requiring the particular railroad to send the cars where they are needed. This power has been exercised by the Commission for many years, and, as noted earlier, a proceeding is now being conducted to investigate possible means of making the car service powers an even more effective tool to achieve better utilization of the existing freight car supply.

We therefore consider that the Commission properly rejected a consideration of car supply factors in the computation of basic per diem. Furthermore, in finding that a reasonable detemination of car ownership costs required payment by all railroads of rates on a time and mileage basis it exercised a judgment well within its discretion which should not be disturbed.

The plaintiff railroads object to the Commission's determination of a second accounting issue, its decision to reject a reproduction cost value base for cars and to set the rental rate level without giving consideration to the effect its choice of cost base would have on car supply. The plaintiff railroads proposed a computation of depreciation, not of incurred car cost, but based on the present cost of replacement of the car. They also proposed that their return on investment should be computed on the same replacement cost new, depreciated to date.

The Commission's limitation under the statutory amendment has been discussed in previous portions of this Memo-

randum. In prescribing the basic per diem charge the Commission may only compensate the owner of the car for ownership and maintenance costs, including a fair return on value.

The Commission noted that the Congress rejected a proposal to create a new "value of use" standard for basic per diem rates. The amendment made no change in the statutory standard for determining basic per diem. The Commission found that in defining the present basis for determining basic per diem rates as including "a fair return on value" the Congress did not define "value" as meaning reproduction cost-new rather than ledger value or present value. *Chicago B. & Q. R. Co.* v. *New York S. & Western Railroad Co.* supra, p. 202.

However, while rejecting the use of reproduction cost as the base for calculation of depreciation and interest, the Commission did find "that the consideration of fair and reasonable per diem charges under modern conditions does require an allowance to car owner for the loss in purchasing power of corporate funds invested in the car. ibid, p. 201. In determining the extent to which such an allowance should be made, the Commission found that railroads do not finance the entire cost of purchase or construction of cars out of their own funds. It determined that the average actual cost borne by the owner approximates 20 percent, and the remaining 80 percent is obtained through various security devices, such as equipment trusts or conditional purchase agreements, wherein both the total amount to be paid and the rate of interest to be paid are fixed by agreement. Moreover, car owners pay to the underwriters of equipment obligations only the same number of dollars originally borrowed, and repayment of principal and interest is effected in dollars of current value at the time of pay-

ment. Car owners incur no increased liability to lenders due to the reduction in the purchasing power of the repayment dollars. For this reason the Commission decided that car owners should not receive from user [*sic*] a contribution measured by this inflation. The Commission found that the cost basis of cars should be constructed upon the following principles:

> "We find that the construction of fair and reasonable per diem charges under modern conditions does require an allowance to car owners for the loss in purchasing power of corporate funds invested in the car. The annual cost of owning and maintaining per diem cars should include, in addition to repair and maintenance costs and provision for property taxes, a portion of the capital expended by the owner for its purchase, together with interest on the uncovered balance, and amounts necessary to make payments of principal and interest on funds acquired through issuance of fixed liability securities to finance the purchase. Only the portion representing corporate funds invested in the car by the owner should be subject to the adjustment reflecting changes in purchasing power." *Chicago B. & Q. R. Co. v. New York, S. & Western Railroad Co.*, supra, p. 201.

In determining "the portion representing corporate funds invested in the car by the owner," the Commission took into account both the down payment and various other factors. It devised a formula which provides for applying a reproduction cost standard to 40% of the cost of the car, representing the amount actually expended by the car owner, and an original cost standard to the remaining 60%, which represents the amount financed through borrowing. The formula further allows interest at the rate of 9% on the amount actually expended by the car owner and 4% on the borrowed amount—or a composite rate of 6%. This was found by the Commission to constitute "just and rea-

sonable compensation to car owners for all costs of interest on investment and borrowed funds, including a fair return on the value of their investment and allowance for losses in purchasing power of invested funds. Ibid, at p. 214.

The plaintiff railroads contend that the debt/equity separation of 80% - 20% the Commission found as the average means of financing new railroad equipment, which is one of the components for computing the car/line [*sic*] rate, is not supported by evidence of record, and that the Commission's findings as to the cost of capital are not supported by sufficient evidence.

The Commission's finding as to the proportion of debt and equity was in part an adoption of the hearing examiner's conclusion. He stated:

> "The evidence requires the finding that few carriers finance the entire cost of purchase or construction of new cars out of retained funds. Commonly the larger part of the needed amounts is obtained through loans secured by equipment trusts or conditional purchase agreements. Not infrequently, the term for repayment of principal is 15 years, with interest on the unpaid balance varying between 2 and 6 percent.' [Footnote omitted]. While the actual portion of the cost borne by the owner in the first instance varies widely, the most common is twenty percent." Recommended report, p. 56.

There was independent and uncontested evidence of record to support the conclusion reached. The acceptance of this determination by the hearing examiner was a reasonable exercise of administrative discretion.

The Commission's decision as to a reasonable return on the invested and borrowed portion of the original cost of freight cars rested upon expert judgment as well as upon sufficient evidence. The Commission held:

"A rate of 4 percent after Federal income taxes is reasonably related to the return generally available from investments having similar risks. It compares with a return earned by railroads from freight service in 1960 of 4.5 percent after taxes and our conclusions in cases of similar reciprocal charges based upon cost, that 4 percent after taxes produced a fair return on value. *Switching at Richmond, Va.*, 245 I.C.C. 293, 298; *Switching Charges at Detroit, Mich.*, 301 I.C.C. 75, 82; *Routing Cancellation at Waterloo, Iowa*, 302 I.C.C. 477, 485. A fair return on the present value of the owner's investment requires consideration of the changes which are reflected in the Account No. 53 index of freight car costs and generally shown in tables I and II, supra. Employing this index as a guide, we conclude that interest at a rate of 9 percent before taxes on the portion of original cost herein allowed as representative of the average ownership investment, which produces approximately 5.5 percent after taxes, provides a fair return on the value of the investment, adequately compensates owners for the impact of inflation, and includes those elements of cost which should be shared by car users." *Chicago, B. & Q. R. Co.* v. *New York, S. & Western R. Co.*, supra, p. 213.

Certain railroads sought to introduce new evidence after the close of the record by including it in their exceptions to the hearing examiner's report, to support a substantially higher rate of interest measured by the average cost of equity capital of some but not all railroads. The Commission ordered the evidence stricken and denied a request for further hearing for the purpose of receiving the material presented in the exceptions and additional related data. Such a matter is within the Commission's discretion.

It is appropriate to note that in a proceeding as complex as this one the Commission's judgment and expertise are necessary commitments [*sic*] of the result. As the Commission itself observed:

> "Were the costs and apportionments involved herein susceptible of precise and indisputable calculations and application, there would be no need for recourse to this Commission. It is the existence of these numerous and extensive areas of imprecision, as well as the opposing theories as to methods of calculating and distributing the costs that make necessary the application of expertise and judgment." 332 I.C.C. 176, 205.

We find that the Commission's determination that the calculation of depreciation and return elements of car time rates should be based on original costs and not reproduction costs are supported by the record and represent a sound exercise of its administrative function. The plaintiff railroad's contention that the Commission erred in adopting a formula not specifically suggested by any party is without substance. Moreover, the formula ultimately adopted by the Commission was first prepared by the hearing examiner in his recommended report and order. All of the parties had an opportunity to debate the issue in their exceptions to the report and thus had an opportunity to be heard prior to a final determination by the Commission. As the formula prescribed by the Commission is appropriate and represents a valid exercise of judgment well within its discretion to make, it should not be disturbed.

Accordingly, an order shall be entered dismissing the complaints and dissolving the preliminary injunction.

Dated this 27th day of May, 1969.

Appendix C

Civil 02981

Union Pacific Railroad Company, et al. v. United States of America and Interstate Commerce Commission.

LAY, Circuit Judge, concurring:

The literal interpretation of Section 1(14)(a) of the Interstate Commerce Act (49 U.S.C. § 1(14)(a)) seems to require the Commission to consider the incentive rates along with the per diem rates and simultaneously in the same proceeding to make a deliberate choice between the two, based upon car supply factors. I have difficulty in rationalizing that the Commission has in fact made a deliberate choice as directed. I nevertheless think that the Commission has substantially complied with the mandate of the statute in temporarily applying the per diem rate and deferring "judgment" as to the quantum of incentive rates necessary. I say this for several reasons:

First, a remand would not accomplish any meaningful purpose. It would simply delay the effective date of the new per diem rates. Yet we today approve these rates and in doing so, we have deferred to the Commission's judgment that they constitute the best and wisest policy of compensation over any other method available. Further delay would only result in the continued use of the older and inferior method of per diem charges without utilization of mileage factors.

Secondly, the postponement by the Commission of the determination of incentive rates arose because there was not satisfactory evidence available on which to base incentive rates necessary to accomplish the desired end of the statute. Under Section 1(14)(a), incentive rates are subject to the Commission's *judgment*. Thus, there exists an area

of discretion as to the specific applicability of incentive rates in any given case. Certainly, if the Commission concludes that a certain incentive rate for any particular car will not "contribute to sound car service practices . . . and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and national defense," it would be arbitrary to apply the same. Cf. *Palmer* v. *United States*, 75 F.Supp. 63, 75 (D.D.C. 1947).

Thirdly, to urge a remand for the sole reason that the incentive rates hearing was not carried on in the same proceeding as the hearing for per diem rates would be to stress procedural formalism without just reason. The statute makes no such specific requirement. It only commands that car supply factors guide the Commission's determination of what rates should be applicable.

Fourth, to say the statute requires the delay of the new per diem rates until the incentive rates are to be applied is unrealistic. If so, the quick solution might be to continue the new per diem rates and then to apply the incentive factors retroactively. However, this would not be consistent with the spirit of the statute, since the primary purpose of the incentive rates is to induce future action, not merely to compensate the owners for past usage.

I conclude that the Commission must act, as soon as practicable, to set incentive rates on the basis of inadequacy of car supply. It has the affirmative duty to do so. It cannot totally refuse to do so, even if it has second thoughts and now feels the legislation is unwise or impractical. Passing upon wisdom of congressional policy is not the proper role of the Commission. However, I do not read the Commission's proceedings as announcing abdication of their responsibility. I sense only, at this time, a dedication to study in order to competently and effectively reach the desired effect Congress has set forth.

Appendix D

Civil 02981

Union Pacific Railroad Company, et al. v. United States of America and Interstate Commerce Commission.

VAN PELT, District Judge, dissenting:

It is with regret that I express disagreement with the holding of my colleagues affirming the Commission's action in this case.

I am in agreement that the House Bill was the one adopted and that comments as to the effect of adopting the Senate version are inappropriate. I also agree with the conclusion that the division approved by the Commission is sufficiently based upon evidence before the Commission that we should accord great weight to the division which the Commission approved.

My disagreement is in the area of congressional intent. Railroad car shortages have been an important public issue for years. For more than a decade prior to the Commission's decision now before us the Interstate Commerce Commission had before it this proceeding to increase per diem rates and thus afford some remedy for this evil. Under the guise of lack of information and that as it was investigating the situation, the proceeding remained undecided. During this delay car shortage became more acute.

The Congress thereupon properly decided to do something about it. The result was the enactment of an amendment to Section 1(14)(a) of the Interstate Commerce Act. It provided in the amendment certain language italicized in the majority opinion and which I repeat italicizing the word "shall":

> "In fixing such compensation to be paid for the use of any type of freight car, the Commission *shall* give

consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and *shall*, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive elements or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

In the House Report recommending this legislation, it is stated:

"If the committee amendment is enacted, the Commission in fixing compensation under existing section 1(14)(a) of the Interstate Commerce Act will be empowered, *in the same proceeding*, to go beyond the basis of elements of ownership expense in computing compensation. Where warranted consideration may be given as to whether such compensation should be increased by an incentive element or elements which will encourage acquisition and maintenance of an adequate car supply. This will be a discretionary power. . . ." See House Report No. 1183, 2 U.S. Code Congressional and Administrative News, 1966, p. 2230.

Under the Commission order now affirmed by my colleagues, a rate is promulgated which admittedly has been established without consideration of the factors which the Congress said shall be considered. Instead of considering these factors in this case, as the House of Representatives expected, as shown by the words "in the same proceeding," it has set up a separate proceeding. Whether it will pend a decade or more, as this case has, is speculation. It is not

speculation that the congressional will and intent has been disregarded by the Commission. It is not speculation that a serious car shortage exists. According to the House Report, *supra*, there is "recurring national shortages of railroad freight cars." These shortages so affect the national economy that the Congress properly gave directions to the Interstate Commerce Commission as to the elements which the Commission shall consider "in its setting of the rates of compensation to be paid for the use of any type of freight car." Congress, in view of the car shortage and the Commission's inaction, was within its rights in using the mandatory "shall" and in attempting to prevent the Commission from doing what it now proposes to do, namely, start another proceeding, with endless hearings and examinations by requiring that its action be taken in the same proceeding in which it "fixes compensation." I feel this court should insist that the mandate of the Congress be carried out now. I would set aside the Commission order and refer the case back to the Commission to make the determination in this proceeding in the manner the Congress intended.

Appendix E

Served January 30, 1968

30408

INTERSTATE COMMERCE COMMISSION

No. 31358

CHICAGO, BURLINGTON & QUINCY R. CO., ET AL. v. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

No. 31358

CHICAGO, BURLINGTON & QUINCY R. CO., ET AL. v. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

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No. 31358[1]

CHICAGO, BURLINGTON & QUINCY R. CO., ET AL. v. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

Decided January 17, 1968

1. In docket Nos. 31358 and 34405, per diem rates of $2.40, $2.75, $2.88 and multilevel per diem rates for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found not shown to be just and reasonable. Just and reasonable rates, for use in the settlement of claims between the complainants and defendants determined.
2. In docket Nos. 33145 and 34405, per diem rates and conservative methods of calculation adequate to provide just and reasonable compensation to owners of freight cars and to provide for fair reasonable, and nondiscriminatory assessment of charges upon railroads using such cars, prescribed.

Andrew C. Armstrong, John C. Ashton, Richard R. Bongartz, S. R. Brittingham, Jr., Robert J. Cooney, John A. Daily, Kemper A. Dobbins, Robert H. Duesenberg, J. H. Durkin, Donald M. Dunn, Kenneth H. Ekin, A. Paul Funkhouser, James A. Gillen, John Guandolo, Alfred W. Hesse, Jr., Howard D. Koontz, A. W. Laisy, R. D. Lalanne, Joseph L. Lenihan, Charles M. Little, David G. Macdonald, G. M. Mariner, John F. McCartney, John E. McCullough, R. K. Merrill, Martin A. Meyer, Jr., P. C. Mullen, W. H. Parsons, Charles D. Peet, Duncan B. Phillips, Ernest Porter, Leb H. Pou, Howard E. Roos, Albert B. Russ, Jr., John J. Schmidt, Andrew C. Scott, John S. Shannon, T. J. Slattery, Elmer B. Trousdale, Donal L. Turkal, Harold B. Vikoren, Robert J. Williams, Claude R. Wilson, Jr., Robert W. Yost, and *Erle J. Zull, Jr.*, appeared for complainants in docket No. 31358 on rehearing and reconsideration.

[1] This report embraces also docket No. 33145, *National Freight Car Per Diem Charges* and docket No. 34405, *Southern Railway Company, et al. v. The Pennsylvania Railroad Company, et al.*, which proceedings were only originally in-

Reginald Ames, Hewitt Biaett, S. R. Brittingham, Jr., Benson T. Buck, J. T. Clark, John H. Colgren, Clifford T. Coomes, Richard E. Costello, John C. Danielson, Kemper A. Dobbins, Gerald E. Dwyer, John W. Hanifin, L. W. Hobbs, Thormund A. Miller, C. Harold Peterson, Roland Posey, W. C. Purnell, Edward M. Reidy, John F. Reilly, E. L. Ryan, Jr., Jerome H. Shapiro, Matthew V. Stepsis, and *Herbert A. Waterman* appeared for interveners in support of complainants in docket No. 31358 on rehearing and reconsideration.

Andrew J. Azzara, Richard Swan Buell, Andrew M. Calamari, James I. Collier, Jr., William T. Griffin, Joseph P. Hawryluk, William J. Hickey, Neal Holland, J. N. Hood, Theodore S. Hope, Jr., George M. Onken, Carl E. Newton, Peter Benson Spruance, Richard H. Stokes, William Tatlock, M. Lauck Walton, and *Granville Whittlesey, Jr.,* appeared for defendants in docket No. 31358 on rehearing and reconsideration.

William J. Hickey and *J. N. Hood* appeared for interveners in support of defendants in docket No. 31358 on rehearing and reconsideration.

All of the above-named counsel and, in addition, the following: *Martin J. Keating, Gordon E. Neuenschwander, Eldon S. Olson, Richard H. Strodel, Donal L. Turkal,* and *L. F. Van Kleeck* for respondents in docket No. 33145.

John Guandolo, David G. Macdonald and *Duncan B. Phillips* for complainants in docket No. 34405.

Reginald Ames, Andrew J. Azzara, Richard R. Bongartz, S. R. Brittingham, Jr., Benson T. Buck, Richard Swan Buell, John H. Colgren, James I. Collier, Jr., Clifford T. Coomes, J. Crossan Cooper, Jr., James A. Gillen, William T. Griffin, John W. Hanifin, Theodore S. Hope, Jr., James W. Hoeland, Howard D. Koontz, A. W. Laisy, Richard D. Lalanne, R. K. Merrill, Thormund A. Miller, Carl E. Newton, George M. Onken, Eldon S. Olson, W. H. Parsons, C. Harold Peterson, Roland Posey, John F. Reilly, Howard E. Roos, Albert B. Russ, Jr., M. D. Sampels, John J. Schmidt, John S. Shannon, Richard H. Stokes, William Tatlock, William A. Thie, Elmer B. Trousdale, Donal L. Turkal, E. L. Van Dellen, Harold R. Vikoren, M. Lauck Walton, Edward K. Wheeler, Granville Wittlesey, Jr., and *Robert W. Yost* for defendants in docket No. 34405.

Lyman C. Bybee for Bureau of Enforcement (formerly Bureau of Inquiry and Compliance), Interstate Commerce Commission.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING.

BUSH, *Commissioner:*

Exceptions to the report and order recommended by the examiner were filed by several parties, each of which subsequently filed replies to the exceptions of the others.[2] Our conclusions differ in part from those recommended. Exceptions and requested findings not specifically reflected in our findings or conclusions have been considered and found not justified.

HISTORY OF THE PROCEEDINGS

The title case was commenced by a complaint filed September 21, 1953, by 19 of the larger class I railroads against several eastern railroads.[3] The complainants sought a finding and declaration by the Commission that each of the rates of $1.75, $2 and $2.40 per day charged by railroad freight car owners to other railroads for use of their cars were just, reasonable, and otherwise lawful during the periods they were effective, and that the performance of orderly transportation service by rail in the public interest required uniform observance of such rates by the defendants together with other carriers. Fifteen class I railroads intervened in behalf of complainants, and 56 railroads, principally classes II and III, intervened in behalf of the defendants. The Commission on October 17, 1955, found and declared that these rates were not in excess of reasonable compensation during the periods they were effective, that the $2.40 charge was not in excess of reasonable compensation for use at that time, and ordered the proceeding discontinued. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291 (1955).

On review by a three-judge United States District Court it was held, one judge dissenting, that the Commission had jurisdiction

[2] Bureau of Enforcement; Boston and Maine Corporation; trustees of the New York, New Haven and Hartford Railroad Company; Southern Railway System; Lehigh Valley Railroad Company; New York Central Railroad Company; Pennsylvania Railroad Company; Long Island Railroad; New Jersey and New York Railroad; Atlantic Coast Line Railroad; Baltimore & Ohio Railroad; Chesapeake & Ohio Railroad; Chicago, Burlington & Quincy Railroad; Chicago & Eastern Illinois Railroad; Chicago, Rock Island & Pacific Railroad; Denver & Rio Grande Western Railroad; Erie-Lackawanna Railroad; Great Northern Railway; Gulf, Mobile & Ohio Railroad; Illinois Central Railroad; Louisville & Nashville Railroad; Missouri Pacific Railroad; Norfolk & Western Railroad; Northern Pacific Railroad; St. Louis-San Francisco Railroad; Seaboard Air Line Railroad; Soo Line Railroad; Southern Pacific Company; Union Pacific Railroad; Western Maryland Railroad; Western Pacific Railroad; and Atchison, Topeka & Santa Fe Railroad.

[3] The original defendants included the Boston & Maine, New York, New Haven and Hartford, Long Island R. Co., New Jersey & New York, Rutland, St. Johnsbury & Lamoille County, and New York, Susquehanna & Western.

under sections 1, 13 and 16 of the Interstate Commerce Act and section 5(d) of the Administrative Procedure Act (5 U.S.C. §1004 (d)) to enter orders awarding damages and, to enter a declaratory order with respect to the reasonableness of past car-hire charges. *Boston & Maine Railroad et al.* v. *United States*, 162 F. Supp. 289 (1958). The court further held that (1) the Commission should not have rejected without a more thorough investigation and more detailed findings and analysis a recommendation that the railroad accounts pertaining to car-hire costs be broken down by the railroads to reflect more accurately the actual annual cost of maintaining a freight car; (2) where depreciation of freight cars was an important element of per diem charge for use on railroads' lines of freight cars owned by other railroads, the Commission in determining unreasonableness of such charges should not have tossed aside as irrelevant accepted accounting practices for determining depreciation based on undepreciated ledger value and should not have accepted "undepreciated [re]production (sic) value"; (3) the Commission erred insofar as it considered car age a factor in computing car utilization; and (4) where time-mileage plan for determining charges for use on railroads' lines of freight cars owned by other railroads involved a separation of national aggregate car ownership cost into two categories, such plan, under facts, deserve more than cursory consideration given to it by the Commission in determining the reasonableness of said charges, since without more detailed findings by the Commission, the court could not exercise its judicial function. The court thus set aside and annulled the order of the Commission discontinuing the proceeding and remanded the case for further proceedings not inconsistent with the court's opinion.

On appeal to the United States Supreme Court, the Commission expressed its readiness to proceed in accordance with the terms of the remand, recognizing that further investigation and more detailed findings would be required to comply with the lower court's opinion. The Supreme Court recognized, however, that:

> Should such proceedings lead the Commission to reconsider its estimate of the desirability of a *per diem* embracing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate.

Boston & Maine Railroad v. *United States*, 358 U.S. 68. On March 24, 1959, the proceedings were reopened for further hearing.

On July 24, 1959, by order in docket No. 33145, we initiated prescriptive action under section 20 of the act requiring detailed reports from the respondent railroads to facilitate more accurate computation of freight car per diem charges, and ordered an investigation pursuant to section 1(14)(a) with a view toward ascertaining the need for establishment of reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carrier-owned freight cars not owned by the using carrier. All rail carriers subject to part I of the act were made respondents. At the same time, the proceedings in docket Nos. 31358 and 33145 were assigned for hearing on a consolidated record.

Prior to June 10, 1953, most of the defendants in docket No. 31358 were parties to an agreement which provided the organization and method by which the daily rate of compensation was to be established. This agreement had been approved by the Commission pursuant to section 5a of the act, and became effective on October 7, 1950.[4] On June 10, 1953, these defendants withdrew from the agreement insofar as it concerned per diem rates and, following the increase to $2.40 on August 1, 1953, notified other lines that they would not pay the increased amount.[5] Thereafter they continued to receive and deliver cars of other lines but paid rental at a lesser rate, generally in the vicinity of $2 per day. They have continued this practice with respect to the rates as subsequently increased.

[4] *Association of American Railroads Agreement*, 277 I.C.C. 413. *Niagara C. & S. Co. v. Akron & B. B. R. Co.*, 300 I.C.C. 73, 302 I.C.C. 265. This agreement provides for use of the services of the General Committee of the Operating Transportation Division of the Association of American Railroads, and the board of directors of that organization, to make studies and recommend establishment and changes in rates, charges, rules and regulations governing per diem, mileage, demurrage and storage. Rates submitted to the members of the agreement by the AAR board of directors are effective only upon majority vote of the members but the close identity between the membership of the agreement and that of the association, together with the use of the association's facilities and committees to administer the provisions of the agreement, have resulted in the rates being generally referred to as AAR rates. For convenience, they will be so designated in this report without suggesting, however, that the legal distinction between the two organizations is not valid.

[5] The first railroad to refuse payment was the New York, Susquehanna & Western Railroad Company, which was not a party to the agreement. Its refusal took place on March 16, 1951, and is the only one which involved payments under the $1.75 and $2 rates. Subsequent to the institution of proceedings in docket No. 31358 this defendant changed management, paid arrears at the rates assessed and has since paid the assessed rates. No issue thus remains with respect to the rates preceding the $2.40 rate.

Following the institution of proceedings in docket No. 31358 there were filed in the United States District Court, Southern District of New York, 109 complaints, consolidated by the court for all purposes, wherein numerous railroad plaintiffs seek to recover from the New York, New Haven and Hartford, and the Boston & Maine, for the use by the defendants of plaintiffs' cars at a rate of $2.40 per day from August 1, 1953, through December 31, 1956, of $2.75 from the latter date to December 1, 1959, and since then of $2.88,[6] less interim payments of about $2 per day made under temporary settlements. The defendants answered contending, among other things, that the claimed rates were unreasonably high and counterclaimed for the difference between the amounts actually paid and any lesser amounts which might be found reasonable. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co.*, 196 F. Supp. 724, 726-727 (1961). On June 15, 1962, the court disposed of several motions and directed entry of partial interlocutory summary judgment in favor of 21 of the plaintiffs extending only to a declaration and adjudication that they are entitled to recover per diem in such amounts as are ultimately found by the court to be due them:

> • • • based upon a rate to be found just, fair, reasonable, and nondiscriminatory by the Interstate Commerce Commission, of which said Commission shall advise this court and thereafter to be ultimately determined and fixed by this court for each month beginning with August 1953 to date to be computed with interest.

The order provided for grant of partial judgment for the remaining plaintiffs. Entry of final money judgment was stayed pending our determination of the controversy in docket No. 31358 or until further order of the court. By order entered on December 19, 1962, leave was granted to amend the complaint in this proceeding so as to request the Commission to furnish the desired findings.

The Illinois Central Railroad Company, one of the complainants in docket No. 31358, is a defendant in two suits pending before the Supreme Court of the State of New York, county of New York, captioned, in part, in one case, *Boston and Maine Railroad* v. *Illinois Central Railroad*, index No. 115/59, and, in the other, *New York, New Haven, and Hartford Railroad Company* v. *Illinois Central Railroad*, index No. 70/63. In each case, the plaintiff sued

[6] Whether these proceedings include charges accruing thereafter, or include charges based upon the multilevel rates, effective January 1, 1964, are not of record. A few of the suits have been settled by agreement of the parties.

the Illinois Central for interline freight balances and it counterclaimed for per diem balances. In dismissing the Boston and Maine's motion to dismiss the counterclaim against it and for summary judgment, the court deferred ruling on the counterclaim to await advice from this Commission as to what per diem rates it would find lawful. Accordingly, the complainants in docket No. 31358 filed an amendment of the complaint praying that the Commission, without regard to the proceeding in docket No. 33145, advise not only the United States District Court for the Southern District of New York, but also the aforementioned Supreme Court of the State of New York in the cases there pending, what per diem rate was just, fair, reasonable, and nondiscriminatory for each month beginning with August 1953, to date, and in so advising the court, find and declare that a rate no less than each of the rates in issue in docket No. 31358 was, during the period each was in force, just, fair, reasonable, and nondiscriminatory.

On March 2, 1964, Southern Railway Company and its affiliates filed a complaint with this Commission (docket No. 34405), pursuant to section 1(14)(a) of the act, against the Pennsylvania Railroad and numerous other railroads, as defendants, challenging the validity of the multilevel per diem rates which had replaced the $2.88 rate, effective January 1, 1964, and praying the Commission to fix for the future, reasonable rules, regulations, and practices respecting freight car per diem service including the compensation to be paid and the basis therefor. Consolidation of the proceeding for hearing with those in docket Nos. 31358 and 33145 was requested and granted.

On March 6, 1964, the Commission granted complainants in docket No. 31358 leave to further amend their complaint so as to bring in issue the multilevel rates which had become effective on January 1, 1964.

We have heretofore observed that the performance of orderly and efficient transportation service by rail will be improved by uniform observance of per diem charges by all carriers. *Association of American Railroads—Agreement, supra.* That conclusion is unmistakably confirmed by the record in these proceedings. The examiner recommended that the railroads continue to administer per diem through the facilities of the per diem agreement, and that the Commission not enter an order at this time which would supersede the procedures and the rights of the parties to that agreement. Upon consideration of the entire record, and the pleadings subsequent to the examiner's report, we find the necessary accord among all participating railroads to be lacking. Our

order herein will, therefore, provide for specific per diem rates and procedures applicable to all railroads and will supersede any existing procedures which are inconsistent herewith.

ISSUES

The issues presented by the above-described proceedings are whether the rates charged at various times over the past decade and a half by car-owning railroads for the use of their cars by other railroads were just, reasonable, and compensatory as provided in sections 1(10), 1(11), and 1(14)(a) of the act; and if not, what rates would meet the standard for that period; and, what rate, rates, or method of establishing rates, will insure the satisfaction of that standard in the future. However, our findings in docket No. 31358 as to the reasonableness of the rates charged in the past are of significance only as an aid to the courts in settling the amount of damages in the pending lawsuits. For convenience, the parties to these proceedings are referred to herein as respondents, except where the context requires more specific identification.

BACKGROUND

During the early development of the railway networks which now cover the United States, it was customary for the individual lines to acquire freight cars necessary for their own operations, and to retain them in their own service. Where freight originating on one line moved to a destination on another, the lading was physically transferred from the car of the originating line to the car of the connecting line. As the railroads grew, this method of handling traffic proved uneconomical and it eventually became the general practice for the originating carrier to deliver its car to the connecting line for movement beyond without disturbing the lading. Cars involved in this interchange service with which the charges here in issue are concerned, are customarily referred to as "per diem" cars. Certain cars, such as refrigerator and tank cars handled under special arrangements, are not involved.

With the enactment of the Interstate Commerce Act, the then established custom of interchanging cars became obligatory on carriers where through routes were established. See *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.*, 22 I.C.C. 39, 44-45; *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U.S. 80, 91, 101-102; and *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615. While

contributing to transportation efficiency, this method of operation created certain problems with which the industry has wrestled ever since.

The right of the car owner to compensation when its car is used by another line has frequently been recognized. See *Virginia Blue Ridge Ry.* v. *Southern Ry. Co.*, 96 I.C.C. 591, 593-594; *Morehead & North Fork R. R. Co.* v. *C. & O. Ry. Co.*, 100 I.C.C. 45, 48; *Jefferson & Northwestern Ry. Co.* v. *M., K. & T. Ry. Co.*, 102 I.C.C. 72, 75. Ascertainment of the amount of compensation and the manner in which it is to be assessed, however, has been subject to considerable experimentation and difference of opinion. In the late 1860's the rates were generally 1 cent per mile on cars of special construction, and 3/4 cent per mile on ordinary cars. They were established by various agreements between railroads, as no national association then existed. In the early 1870's a railroad in New England experimented with a combination mileage and time plan, and two central western carriers employed a rate of 50 cents per day between themselves. In 1888 a combination of mileage and per diem payment was attempted but abandoned after a few months due, among other factors, to the increased accounting costs. The straight mileage system was finally abandoned in 1902 and on July 1 of that year the flat daily rate system of charging became effective. See *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 374-375; *Chicago, R. I. & P. Ry. Co.* v. *United States*, *supra*. This method prevailed until January 1, 1964, when it was modified by providing a scale of daily rates varying with the value of the car. By 1920 the daily rate had risen to $1 per day, and by September 1, 1947, to $1.50 per day.

Subsequent increases were as follows:

Effective November 1, 1949	$1.75
May 1, 1952	2.00
August 1, 1953	2.40
January 1, 1957	2.75
December 1, 1959	2.88
January 1, 1964	multilevel rates

The multilevel rates which became effective on January 1, 1964, were as follows:

Value bracket	*Per diem rate*
(1) $1,000 and less	$2.16
(2) 1,001 to 5,000	2.79
(3) 5,001 to 10,000	3.58
(4) 10,001 to 15,000	4.50
(5) 15,001 to 20,000	6.15
(6) Over $20,000	7.74

On April 1, 1965, following the close of the hearings in these proceedings, a further revision was made in the scale of multi-level rates, of which official notice is hereby taken. This revision substituted four new brackets for cars formerly covered by bracket No. 6, as follows:

(6) $20,000.01 to $25,000	$7.11
(7) 25,000.01 to 30,000	9.00
(8) 30,000.01 to 35,000	10.18
(9) 35.00.01 and over	12.18

If there were but two railroads, and each used the other's cars to the same degree, the payments would balance and it would matter little whether they were established at $1 or $100 per day. For those railroads today whose payments balance receipts within reasonable limits, the problem is quite similar. The actual situation however is far more complex for many carriers. Nearly all railroads are car owners, and all railroads are users of cars owned by the others. In 1960 there were over 100 class I line-haul railroads, over 300 class II line-haul railroads, and about 200 classes I and II switching and terminal companies and electric railways involved in these payments. The significant figures are the net payable balances and at any given time a carrier may be a net creditor as to one line, and a net debtor as to others. A line which is, in total amount, a net creditor line on an annual basis, may be in a net debtor position with respect to particular lines, and all these relationships can vary from month to month throughout the year. Railroads having a high ratio of originations of shipments to terminations generally occupy a net per diem creditor status. Those having a high ratio of terminations to originations are generally net per diem debtors.

The Statute and Nature of Per Diem

Section 1(10) of the act defines "car service" as including the use, control, supply, movement, distribution, exchange, interchange, and return of cars by any carrier by railroad subject to

part I. Section 1(11) makes it the duty of every such carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. Unjust and unreasonable rules, regulations, and practices with respect to car service are prohibited and declared unlawful. Section 1(14)(a) authorizes the Commission, after hearing, to establish reasonable rules, regulations, and practices with respect to car service, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any car not owned by the carrier using it.

In prescribing the compensation for the use of foreign cars[1] pursuant to section 1(14)(a) of the act, the Commission is exercising its statutory authority to establish basic per diem predicated upon costs. The owner of a car, required to release possession thereof to another carrier for the further transportation of the freight it contains, may not be deprived of its use without compensation. On the other hand, the carrier obtaining the use of the car is required to accept possession for the purpose of continuing the transportation, and may not be required to pay therefor more than the average cost it would have incurred as owner of the car or by use of its own car. The two requirements cannot be met except by calculation of the average ownership burden based upon costs, measured with such accuracy as is reasonably possible and distributed among the car users and owners in a manner which can be found most equitable to all. We agree with the conclusion of the examiner that the "compensation" mentioned in section 1(14)(a) of the act relating to "basic" per diem does not include any element of profit to the owner of the car and may not be measured by the benefit which the user derives from use of the car. Per diem charges are in the nature of a reciprocal charge and are designed to represent the average cost of car ownership. The charge should be equivalent to the average car ownership costs which the users would have to bear if they owned the car. See *Virginia Blue Ridge Ry. v. Southern Ry. Co.*, *supra*; *Jefferson & Northwestern Ry. Co. v. K., A. & T., Ry. Co.*, *supra*; *Marcellus & Otisco Co. v. N. Y. C. & H. R. R. Co.*, 104 I.C.C. 389, 392, *Rules for Car-Hire Settlement*, *supra*; *Scott Ry. Equipment Co. v. Assn. of American Railroads*, 274 I.C.C. 469, 482; *Palmer v. United States*, 75 F. Supp. 63. "It has long been generally recognized that car hire, however established, should be

[1] Customarily referred to as a "foreign car."

enough reasonably to compensate the car owner for its costs of ownership and no more * * *." *Boston & Maine Railroad* v. *United States*, *supra*.

This conclusion is confirmed by the 1966 amendment to section 1(14)(a) and the statutory history relating thereto. The basic per diem charge may not be used, or include sums as elements of compensation, to enforce car service rules, encourage car acquisition, et cetera; these functions being reserved for the added incentive element when found justified. As amended by Public Law 89-430, section 1(14)(a) now provides, in part:

> In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

In its prior form, this statute also required the compensation to be reasonable and we do not view the added language as making any change in this respect.[8] As a result of this amendment, however, the function and composition of basic per diem rates have been clarified. They are applicable to per diem cars generally, and are to be computed solely on the basis of elements of ownership expense involved in owning and maintaining the cars, including a fair return on value. Per diem charges may not include any amount for the value of the use of a car. See Cong. Rec.—House—May 12, 1966, page 9946.

There is sound reason why these per diem charges should constitute no more than a sharing of cost. We are not concerned with the problem of calculating proper charges to customers of the respondents, but with the assignment among a group of carriers engaged in multitudinous joint ventures, of the burden of acquiring and maintaining the vehicles used by all. Not only is their use compulsory,

[8] See 112 Cong. Rec. (House), May 12, 1966, page 9946. The amendment was worded in that language after the courts had given to the designation of the fair return on value.

on the paying line but a great deal of the use which is made and for which charges are paid is not productive of revenue to the user. This occurs on empty return of cars to owners which, in many instances, is accomplished by carriers who did not participate in the loaded revenue movement which took the car off line. The relationship of the parties is not that of a lessor and lessee, and the term "rent" frequently employed to describe the per diem charge does not connote such a relationship.[9]

Costs

Upon reopening of docket No. 31358, we instituted the investigation proceeding, docket No. 33145 and incorporated therein an order under section 20 of the act, requiring the filing of special reports by all railroads. These reports were analyzed by staff personnel of our Bureau of Accounts and a series of cost computations were made which were thereafter served upon all parties and submitted in evidence. We adopt as a correct statement of the facts, the description by the hearing examiner of these reports and computations, and of those employed by the AAR staff in developing the per diem rates adopted by the members of the per diem agreement. The pertinent portions of the examiner's report are set forth in the appendix to this report.

Generally recognized as the largest single item is the group of costs properly attributable to the repair and maintenance of cars in interchange service. After consideration of the various criticisms directed to the cost calculations prepared by the section of Cost Finding, Bureau of Accounts, the examiner concluded that the ownership costs developed by the studies, apportionments, and analysis, for maintenance and repair of freight cars and associated facilities, for 1960, were as accurate as could reasonably be obtained and fairly represented the total ownership costs for the year.

Car repair costs and associated maintenance expenses, as developed by the Cost section of Cost Finding studies and analysis are as follows:

1. Freight-train car repairs including allocation of inspection costs, nonrevenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars	$583,715,147
2. Depreciation on freight-train car repair facilities computed on undepreciated original cost	$8,023,021
3. Property taxes on car repair facilities	$3,824,341
4. Payroll taxes	$28,140,156
5. Return on investment in freight-train car repair facilities computed at 4 percent (after income taxes) on depreciation original cost	$11,489,897
6. Return on working capital	$2,896,316
Total	$638,098,858

This total cost, divided by the 1,641,200 average number of per diem freight train cars in service in 1960 produces an average repair and maintenance cost per car of $388.80. Exceptions to the examiner's report do not challenge the method or accuracy of this computation insofar as it calculates the total ownership cost of repair and maintenance, but are directed to the apportionment of those costs between home and foreign cars and the development of an amount referred to as the "repair deficiency."

A great deal of repair work is accomplished on foreign cars by using railroads. Repairs made necessary by improper use and handling of the car are not considered ownership responsibility items; and the costs are customarily borne by the responsible railroad. For the purpose of computing per diem rates, ownership repair costs are those made necessary by ordinary usage, and the maintenance normally required to keep the car in good operating condition. Interchange Rules of the Association of American Railroads provide specifically for the calculation of the amounts which owners are to pay users for repairs made by the latter. The figures used by the Section of Cost Finding in developing the total repair cost include all costs which were assigned as the responsibility of the owners, whether they were accomplished by the owners or by users. Initially the calculation of ownership cost was accomplished upon the assumption that owners had fully paid users, and had thus borne themselves all the costs of ownership responsibility repairs. Certain respondents contend that the amounts which owners pay to users for such repairs, pursuant to the AAR rules, are inadequate, and that the deficiency should be taken into account in calculating the ownership cost and resulting per diem rates. Of the $583,715,147 of total ownership responsibility repairs for the year 1960, as computed by the Section of Cost Finding, the distribution produced by the sample studies indicates that $186,482,539

was accomplished by user railroads and that $98,534,020 of this amount was not reimbursed to them by the owners. Distributed over the per diem days paid for by all U. S. railroads in 1960, the latter amounts to 41.417 cents per day.

Certain of the respondents challenge the accuracy of apportionments used in developing this "repair deficiency," and renew their objections to the refusal of the hearing examiner to receive certain exhibits related thereto. Also excepted to by other respondents is the refusal of the examiner to deduct the deficiency from total ownership costs before calculating the per diem rate.

The exhibits in issue were not submitted in compliance with the special rules of procedure established for the conduct of these proceedings and were properly excluded. In view of our conclusions with respect to the "repair deficiency" it is unnecessary to give further consideration either to these exhibits or to the challenged Section of Cost Finding calculations and apportionments. The determination of reasonable compensation to the owner of a freight car for the costs of purchase and maintenance of a car which it puts into per diem service is a problem distinct from the adequacy of payments it makes to other parties for performance of some of its responsibilities. The issue of setoff payments should not be allowed to becloud the solution sought in this proceeding. Introduction of contentions regarding the adequacy of reimbursements by owners would import into this case a secondary dispute, and put on trial the AAR method of establishing the standard charges between railroads for repair of each others cars.

In computing the ownership costs it is proper to take into account all expenses incurred in maintaining interchange cars in operable condition, other than user responsibility items. Whether the costs incurred by users in effecting ownership responsibility repairs are fully reimbursed to them under another set of rates and regulations made by the carriers' own organization is irrelevant. The methods used to compute those rates are subject to review and revision by the AAR, as found necessary. To compute and apply a fixed amount as a deduction from total ownership costs before calculation of the per diem rates would tend to freeze into its present mold the method used by the AAR in an entirely separate area.

Such a deduction requires the assumption that, in all cases, with respect to each owner, the total cost of repairs made by each user to cars of that owner exceeds by precisely the same amount the sum paid by the particular owner to the user as reimbursement under the AAR rules. No logical relationship was shown to exist

between the number of foreign car days on line on which per diem would be computed, the amount of repairs made, and the fixed amount of the deficiency allowance. The evidence with respect to car days and reimbursements is persuasive that application of the car-repair deficiency as a flat reduction in the per diem rate would produce an inequitable distribution among the carriers. Users who accomplish few repairs but have a relatively high proportion of foreign car days on line would receive excessive reimbursement, and *vice versa*. The impact upon owners would also be inequitable. Each owning line would suffer the same reduction in its per diem receipts, regardless of the line using its car. The effect would be to require owners to overcompensate users in some instances, while undercompensating other users.

Certain respondents contend that reduction of the per diem rate by application of the average amount of repair deficiency is no more than another application of average costing to a problem which admittedly must rely upon averages with respect to many items. The distinction, however, is that reliance upon an average in this instance is not required. Settlements of repair reimbursements are made regularly by and between individual carriers by billings for specific repairs. It is clearly possible, by making these billings properly renumerative in each instance, to effect reimbursement according to actual costs and avoid the inequities inherent in averaging.

The argument is made that allowance of the repair deficiency is essential if equitable treatment is to be given user lines, and that to fail to make such allowance would constitute a taking of their property without due process. It is asserted that, since the total amount for which they were liable in 1960 was $594,541,744, and, since allegedly, they were not reimbursed for $98,534,020 of ownership repairs made by them, users have, in effect, already paid that much. The failure to deduct it before calculating the per diem rate allegedly requires them to pay it twice. The appeal to justice in this contention loses force, however, upon close scrutiny.

All of the several hundred carriers affected by these rates are users of cars of each other, make repairs on cars of others, and, to the extent that there is a deficiency in the reimbursement for the cost of such repairs, suffer therefrom. The record warrants the conclusion that the impact of the deficiency varies widely from carrier to carrier. Of all these carriers, only four contend that the deficiency should be calculated and subtracted from the

total ownership costs in determining the per diem rate.[10] None including these four, have attempted to have the AAR rates for reimbursement revised to eliminate the deficiency. Of the four which support the contention, only two, the New Jersey and New York and the Long Island Railroad, appear on this record to suffer from the deficiency. Both the Boston & Maine and the New York, New Haven and Hartford derive substantial benefits from the failure of the AAR rates to include all repair costs. A study of payments and receipts of 18 major railroads in connection with the B&M and the NY, NH&H, indicates that, in 1960, the B&M received a total of $57,848.75 for repairs it made to their cars and paid the same lines $162,117.08 for repairs they made to B&M cars. It is apparent that the B&M received the benefit of nearly three times its unreimbursed costs in repair costs on its cars which it did not reimburse.[11] The New Haven, in 1960, received $92,316.30 for repairs which it made and paid the same lines $309,913.27. It enjoyed the benefit of repairs to its cars at unreimbursed costs over three times those which it failed to recover under the AAR rates.[12]

Losses due to the repair deficiency are incurred only to the extent that a line makes more repairs to the cars of another than that other makes on its cars. Both the B&M and the New Haven are predominantly terminating lines, having available many more foreign cars than needed for their originations, and can employ some selectivity in their choice of cars to supply to shippers. Both exercise careful control over the amount of foreign car repair work undertaken. The B&M has a policy of making repairs to foreign cars primarily to put them in condition to pass safety tests of the AAR interchange rules. While there is some evidence that certain of the repairs made by other lines to the B&M cars might not have been considered necessary by that

railroad, the record does not warrant a finding that unnecessary repairs are made to any measurable extent. The major originating lines have shipper demands for cars requiring the use of foreign cars which need repairs, not only for safety purposes but also to make them fit to handle the freight. These lines have not the extent of choice in cars to be supplied, and are obliged to make more light repairs than predominately terminating lines.

The Long Island Railroad, having no cars in per diem service, does not enjoy the benefit of the allegedly underpriced repairs. It and the New Jersey and New York Railroad are the only lines suffering a loss from this situation which seek to have it remedied by a reduction in the per diem charges. As computed for 1960, the reduction amounts to 45 cents per day spread over the per diem days paid for by class I line-haul roads, and about 41 cents per day if spread over the per diem days paid for by all U. S. roads. Figures assembled by 20 railroads for the year 1960 indicate that total payments by them to the Long Island for repairs to their cars were $33,321.19. Assuming the accuracy of the deficiency as calculated by the Section of Cost Finding this would indicate a possible unreimbursed amount, using the average figure, of $37,575. These railroads had over 400,000 per diem days of their cars on the Long Island. At the average deduction of 41 cents per day this line would receive an offsetting reduction in per diem costs of over $160,000, over four times the indicated loss. The record also shows that the Long Island, like all other railroads, incurs liability for repair of foreign cars which falls into the user class, and which it satisfies by returning the cars to the owners, paying the owners at AAR rates for effecting the repairs. It thus obtains certain benefits from the ability to pay for the repairs at the AAR rates instead of making the repair itself at higher cost. While this class of repair work is not part of ownership costs included in the car rental charges, its existence cannot be ignored in considering the extent to which carriers suffer from the limitations on reimbursement in the AAR rates.[13] The record does not disclose the extent to which benefits were obtained in this manner but it is apparent that even this railroad did not suffer unmitigated inequity from the lack of complete reimbursement for its expenses in repairing foreign cars. The

[13] For 1960, the Long Island received $7,185.42 from the New York Central for repairs to the latter's car, but paid that line $13,542.48 for joint repairs on NYC cars for which the Long Island was responsible. It thus received the benefit of nearly twice the amount of deficiency that it suffered on the repairs it made.

experience of the New Jersey and New York Railroad in this respect is not shown.

All other respondents oppose use of the deficiency as a deduction from the per diem rate. The B&M and New Haven, which contend that use of the deficiency in this manner, appear to have benefited from the existence of the deficiency, and it is clear that they would experience less favorable repair balances if the AAR rates were increased to the extent necessary to eliminate the apparent deficiency. If, however, the deficiency is deducted from the per diem charge, these lines will obtain a further benefit. Since they are per diem debtors, such a reduction, like any other action having the effect of reducing the rate, would lower the net balance payable by lines in this position. The consequence would be that these lines, which have already enjoyed the benefit of having their cars repaired at savings in cost exceeding the losses they sustained in making undercost repairs to other cars, would receive a second benefit from deducting the deficiency from their per diem bills. The other lines, on the other hand, would suffer a double loss. It cannot be found that failure to deduct the deficiency from the per diem rate would result in a taking of property without due process from the parties seeking this relief.

Upon all the evidence, it is found that the car repair deficiency, to the extent that it actually exists, should be corrected by adjustment in the AAR billing rates, and that any attempt to compensate for the deficiency by a deduction from the car rental charge would be unreasonable.

The analysis employed in developing the repair and maintenance costs of per diem cars by the Section of Cost Finding is based upon more recent data than that employed in the analysis used by the AAR. (See appendix.) As hereinafter discussed, the various ratios and apportionments developed by the 1960 studies are, in large part, useable in the calculation of costs for other years under this method. Insofar as the development of total ownership cost of repair and maintenance of per diem cars is concerned, no persuasive objections to its adoption have been shown. Upon the record, we find that, subject to adjustments hereinafter mentioned, the total per diem ownership repair and maintenance costs developed by use of the method appearing as schedule I of the Section of Cost Finding analysis fairly and reasonably measures the amount for which owners should be reimbursed. We shall require that this method be employed in the

calculation of per diem ownership repair and maintenance costs for the purpose of setting per diem rates in the future.

Property taxes on freight cars are so varied from State to State and for various periods as to make precise measurement impracticable. The amount is estimated by both the AAR and the Section of Cost Finding by use of a factor developed by taking a ratio of all property taxes to total investment and applying this ratio to the investment in freight cars. In recent years the ratios have varied from slightly under to slightly over 1 percent. We find that this procedure results in a just and reasonable allowance for this expense.

Compensation to the owner for the burden which is assumed in purchasing or building the car has customarily been calculated, on an annual basis, by including an amount representing the depreciation charges for 1 year and an amount representing an interest return on the undepreciated balance of the cost. In the calculations underlying the AAR rates prior to 1953 the average original cost of all cars as the base for depreciation was used. In subsequent years the base employed was the average original cost adjusted by an index designed to produce what has been called reproduction cost. Straight-line method of depreciation has been used, at the average rates used by carriers and authorized by the Commission, approximating 3.0 percent. In effect, this has amounted to an allowance of 10 percent of car cost as salvage value and a spreading of recovery of the remaining 90 percent over an assumed life of about 30 years. Beginning with the studies underlying the $1.50 rate in 1947, the base used to compute interest was the average of depreciated original cost and depreciated reproduction cost of the average car in the fleet. In studies underlying the $2.75 and later rates, depreciated reproduction cost was used as the base. In all instances, interest was computed at 6 percent before taxes.

The present multilevel system of per diem rates also provides for investment costs by including amounts for annual depreciation and interest on the undepreciated balance of the cost. Under this system, the cars are grouped in nine brackets, six of which cover spans of $5,000, one a span of $4,000, one a span of $1,000, and the last, all cars costing over $35,000.01. Cars are placed in a bracket according to their original cost plus additions and betterments, depreciated. The rate applicable to all cars in each bracket, however, is based upon allowances for depreciation and

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interest using the weighted average of the reproduction costs of the cars.

The analysis prepared by the Section of Cost Finding in these proceedings used original cost as the base for depreciation and depreciated original cost as the base for interest charges. Straight-line depreciation was used at a rate of approximately 3 percent. Interest at a rate of 6.62 percent before taxes, equivalent to 4 percent after taxes, was allowed on the depreciated original cost. Southern Railway seeks the use of a shortened depreciation period of 14 years while, on brief, certain other respondents contend that the 30-year period should be retained for cars in the 3 lower AAR value groups, but that a shortened period of 20 years be employed for cars in the higher groups. No evidence was offered in support of the latter suggestion and we find that neither of the shorter periods are practicable at this time.

Attention is called to the fact that recent revisions of regulations of the Department of the Treasury may permit railroads to employ a 14-year period for calculation of charges to depreciation. Although it is argued that this represents a considered assessment by the Department of the realistic economic life of freight cars, the record does not support such a conclusion. Neither the revised regulations nor the factors which underlay the change in depreciation period allowances were shown. So far as appears on this record the change stems from a policy decision to encourage investment, and is applicable to a carrier only if it satisfies the Department that particular proportions of its capital are being renewed according to a prescribed schedule. Freight car value comprises only a portion of the total involved. The test is based upon dollar totals rather than with reference to the lives of specific equipment.

The record demonstrates that railroad freight cars are used for periods which greatly exceed the suggested periods of 14 and 20 years. There is no convincing evidence that railroad management generally considers cars to be no longer economically useful after these periods have expired. As of January 1, 1962, nearly 38 percent of the cars in service were over 20 years old, and over 49 percent were over 15 years old. Of 1,606,475 freight cars in interchange service, on January 1, 1962, 324,729, or 20.2 percent, were over 30 years of age. Over 13,000 of these cars had been in operation for more than 50 years. Ten years earlier, in 1952, the number of cars over 30 years was 315,935, or 17.92

percent of the total. No tendency to a reduction in the useable life of cars is indicated. While managerial views might differ as to the advisability of retaining some of the older cars, it is evident that car owners do not consider them unserviceable after 15 or 20 years of use. Nor can it be found that cars now being constructed will be subjected to any different treatment in this respect.

A further consideration which may not be ignored is the fact that the freight rates charged shippers, which are the source of income from which each user must pay its proportion of the costs of the service, generally are constructed with reference to costs of operation based upon a spreading of capital costs of revenue earning equipment over periods substantially longer than 15 years. While the amounts included as charges to depreciation and interest represent only a portion of the total considered in assessing the compensative qualities of freight rates, they are not insignificant.

The expected useful life of the car is a measure of the appropriate annual depreciation charge only when considered in connection with the portion of the cost to be depreciated. Deduction of 10 percent of the cost as the anticipated salvage value is a customary and convenient method of fixing the portion but it is not necessarily more reliable than other possible choices. The Section of Valuation and Depreciation of the Bureau of Accounts employs an estimated 17-percent salvage value and a 25-year life, which indicates an annual rate of depreciation of 3.32 percent. The total depreciation reported in railroad annual reports to the Commission in 1960 for freight cars was $205,740,270, of which $197,060,088 was assigned to per diem cars by the Section of Cost Finding analysis of the distribution of per diem and non-per diem cars. In addition, this analysis allowed $17,594,870 taken from Rail Form A calculation of normal depreciation applicable to per diem cars already amortized. The total of $214,654,958 amounts to 3 percent of the Rail Form A total original cost of these cars as of December 31, 1960, of $7,063,892,859. The record shows depreciation rates of freight cars currently in use by a number of railroads which range from 2.55 percent to 3.60 percent. We find that an annual allowance of 3 percent of the cost of freight cars as a portion of the costs employed in calculating per diem charges provides just and reasonable contribution by car users and adequately provides for reimbursement of car owners for the loss in value of the car.

Railroads which buy or build cars today face a problem caused, in large part, by the radical change in the character and cost of

railroad freight cars which has occurred in the past 20 years. A gradual increase in the cost of producing standard cars would not by itself have produced so pressing a problem, so long as freight cars, on the average, were of a few general types and cost about the same to build and maintain. Such had been the situation for many years prior to World War II and, while increasing costs resulted in increasing the car rental rate up to the $1 per day which it reached in 1920, and at which it remained until 1945, there had appeared no radical variations in the average costs of cars in the fleet. This condition underwent a substantial change after 1945.[14] The problem of rapidly increasing costs has been augmented by the development of special types of cars, and special features for the protection of freight which, together with the trend to larger cars, has produced appreciable disparities in the costs of the various cars now in use. The differences in the original costs of modern cars have made unrealistic the application of a single, uniform per diem charge. In order to provide reasonable compensation to car owners, charges must be assessed which reflect, as accurately as possible, the particular acquisition cost of the car in use. At the same time, there also arises a need to exercise care in determining the amount necessary to reimburse owners for that cost.

Certain respondents contend that rates carrying with car cost cannot be approved or prescribed due to the lack of reliable information as to the extent such cars vary in their repair cost experience and annual utilization. It is argued that the new, high-cost cars receive much greater use than the older cars, and should have their higher costs spread over a greater number of active days than the average of all cars. The increasingly higher investments required to acquire new freight cars in recent years, however, make it necessary to apply varying rates in order to compensate for the burden undertaken by owners of such cars. While some evidence indicates that the newer cars spend more time off line than old cars, and perhaps incur a greater number of per diem payable days by foreign lines, it does not support any finding that their overall utilization, both on and off line, is measurably different. It was not shown that any workable separation can be made between cars on the basis of value, which relates to utilization. No studies were made with respect to this alleged distinction in the car-day divisor and no basis exists for finding the average divisor inapplicable to cars in all value brackets.

[14] Between 1939 and 1945 the Bureau of Statistics used index for Account No. 53, Freight Train Cars, base 100 points, an average of about five points per year. Between 1945 and 1950 the increase was 341 points, or nearly 25 points per year.

A similar conclusion is apparent with respect to costs of repair and maintenance. If a significant difference exists, the age of the car appears to provide a more certain measure than the depreciated value currently assigned to the car. It cannot be found on this record, however, that any measurable progression in repair costs exists in relation to either the age or depreciated value of the car. Nor can it be found that the difference, if any, between the average repair cost and the actual repair cost of new or old cars, is so great as to make unreasonable the results reached by use of the average. We would not be warranted in stepping up rates varying with car cost merely because of the uncertain possible differences in utilization and repair costs. If future studies demonstrate that measurable and significant differences exist, they should be brought to the attention of the Commission.

We consider it unsound the contention that nationwide average costs should not be used in the calculation of per diem charges. This has been the industry practice for many decades, and to our knowledge no uniform charges be reasonably computed. That the costs experienced by different car owners vary, and as a result the extent of their reimbursement through the per diem payment will vary, is a consequence which must be accepted if the uniformity in charges which we have found essential to orderly and efficient transportation by rail is to be achieved.

One of the many issues in these proceedings is the extent to which depreciation cost should be employed as the base for calculation of depreciation allowances. We have observed that equitable treatment of both car owners and users requires that the actual costs be considered with such accuracy as is reasonably possible. If car owners are to be compensated for some additional amount, it is incumbent upon them to establish the propriety of the payment.

It is common knowledge that the purchasing power of the dollar has been steadily reduced over the past 30 years. Many more dollars would be required to purchase today a car identical with one built 30 years ago, and a car owner receiving payments from car users in dollars of current purchasing power does not receive the same relative contribution to the cost of the car as it made at the time of purchase. Had each user of the car been the original purchaser, it would be subject to the same erosion of the dollar

chasing power of the dollars used, and would reasonably be expected to bear a share of that erosion. The use of reproduction cost as a basis attempts to translate into dollars of today's value the number of higher value dollars invested in the car, and to spread the impact of inflation over all users, including the owner. In principle, equating the per diem dollars contributed by users to dollars actually invested by the owner appears essential to fair compensation. Thus, to the extent that the per diem charge is comprised of reimbursement of such funds, the contribution with respect to the cost should be measured in dollars of purchasing power equivalent to those invested.

Proponents of the unrestricted application of reproduction cost to the full cost of the freight cars have failed to show that this method of calculation provides a reasonable measure of the actual costs incurred. In periods of rising prices, borrowing shields an investor from decline in purchasing power. The risk of decline in terms to the lender and clearly no need exists to compensate the investor therefor. The evidence in this record requires the finding that carriers do not finance the entire cost of purchase or construction of cars out of railroad funds. Commonly the larger part of the needed amounts is obtained through private security devices, such as equipment trusts or conditional purchase agreements, wherein both the total amount to be paid and the rate of interest to be paid is fixed by agreement. Generally, the term for repayment of principal of such loans is about 15 years, with interest on the unpaid balance ranging between 3 and 6 percent. The section of Cost Finding studies in 1961 indicated an average interest rate on outstanding obligations of 4 percent. While the actual portion of the cost borne by owners in the form of interest varies, the average approximates 20 percent.

Car owners are required to repay to the underwriters of equipment obligations only the same number of dollars originally provided. Repayment of principal and interest charges on these sums is effected in dollars of current value at the time of payment. The freight car owner incurs no increased liability to lenders due to the reduction in the purchasing power of the repayment dollars, and should not receive from users a compensation unwarranted by the inflation. We find no justification for basing these costs on cost of a reproduction cost base. To compensate the owner for principal and interest which it must pay to obtain funds invested to purchase the car, users should contribute no more than their proportion of the amount actually paid.

charges are not based upon an inflated book figure and should not be so inflated when passed on to users.

Where a car owner has paid part of the cost of a new car with its own funds, and recovers each year a portion of its investment from per diem receipts, the inclusion of interest on the unrecovered portion of the investment is designed to compensate for the interest which might have been earned on that amount in an equivalent alternate investment. No reason appears why that interest should be inflated with the passage of time by application of an index to the original amount invested purporting to represent the increased cost of building or buying freight cars. There is no basis in this record for a finding that possible alternative investments would have undergone any appreciation, or if they had, that the owners would have taken such advantage of it as to convert the amount into a higher figure upon which the same interest return would be computed. Interest on alternative investments would normally be received annually in the same general fashion as per diem payments, and thus undergo the same reduction in purchasing power.

We find that the construction of fair and reasonable per diem charges under modern conditions does require an allowance to car owners for the loss in purchasing power of corporate funds invested in the car. The annual cost of owning and maintaining per diem cars should include, in addition to repair and maintenance costs and provision for property taxes, a portion of the capital expended by the owner for its purchase, together with interest on the unrecovered balance, and amounts necessary to make payments of principal and interest on funds acquired through issuance of fixed liability securities to finance the purchase. Only the portion representing corporate funds invested in the car by the owner should be subject to the adjustment reflecting changes in purchasing power.

It is asserted that separation of the elements of acquisition cost in this fashion is a novel approach not considered at the hearings. The demand for increased charges based upon the use of reproduction costs, however, makes inevitable a determination as to the validity of this procedure. The order instituting docket No. 33143 identified the proceeding as an investigation under section 1(14)(a) of the act for the purpose of establishing reasonable rules, regulations, and practices with respect to determining the compensation to be paid for the use of carriers'

owned freight cars which are not owned by the using carrier. All parties were aware that the extent to which reproduction costs were to be used was one of the primary issues. The United States District Court had specifically identified this issue in remanding the proceeding in [illegible] v. United States, supra. Application of the reproduction cost index to a portion of the annual cost was the procedure used in the AAR calculations prior to 1953. There is nothing novel or unusual about its use here.

With the costs of modern cars rising and substantial portions of the price being financed, it becomes essential to a just and fair result that a reasonable measurement be made of the annual portion which is actually affected by inflation. In referring to a fair return on value, Congress did not intend that car owners were to be compensated for fictitious costs. Such would be the result of computing charges for depreciation and interest using the reproduction cost and depreciated reproduction cost, respectively, of the car, without consideration of the portion of the cost actually representative of the owner's investment. Unless we are to find that per diem charges shall be computed solely and directly on the original cost of the car, no choice exists but to consider the various means by which the funds are obtained to acquire cars and the extent to which they produce a real cost to the purchaser.

Much of the argument in support of a blanket application of reproduction cost is founded in a "value of use" concept which, as we have pointed out, is inappropriate for application to the activity with which we are concerned. It would require users, whether using the car in a joint move participated in by the owner, in a revenue move not participated in by the owner, or returning the car empty in a non-revenue move, to pay the owner the full amount, including profit, that the owner could get from on-line use of the car. The legislative history of the 1966 amendment to section 1(18)(a) clearly prohibits any allowance based upon this concept. See [illegible] May 12, 1966, page [illegible].

Those respondents who support application of reproduction cost in full and use of higher rates of interest assert that these are necessary due to the failure of new, more attractive cars to be returned to the owner's line with satisfactory frequency. Experience of some railroads indicates that such cars spend a greater proportion of the year off-line than older, and perhaps less de-

strable cars. The record is not in sufficient detail, however, to support findings with respect to the actual loss of remunerative use suffered by the owners in such cases. The higher days-off-line record of the newer cars may, to some extent, be the product of their prompt reloading and forwarding by the owner when received back from a prior movement. Pending changes in the car-service rules may result in improved return of cars to owning lines but, to the extent that an owner fails to obtain the amount of productive use of a new car reasonably to be expected in interchange service, in light of the requirements of its shippers, the answer is not to require all users of all cars to pay excessive charges. Improvement in car service rules and diligence in their enforcement is required.

Another ownership risk, for which compensation is sought by use of reproduction costs, is that associated with premature obsolescence due to traffic changes or technological progress, and that associated with reduced economic activity resulting in lack of revenue producing employment for the car. This cost, however, is already borne by all users, due to the manner in which the ownership cost is distributed. The car-day dividend excludes a large percentage of home surplus and bad order cars, on owner's lines, while the dividend includes the costs of all cars. The quotient is thus enlarged so as to spread over all days of active cars a ratable portion of the costs of cars for which current employment is not available or feasible. Owners having home cars on line, now in use by reason of the above-mentioned risks, receive in the daily car-rental payments for cars in active use a share of the costs of the idle cars.

We have found that the average investment by car owners in the original acquisition cost of cars is 20 percent and that, in general, the principal amount of equipment obligations is required to be paid in 15 years. While precise reimbursement of the ownership burden would require proportionate contribution of the costs of ownership in the same amounts and within the same period of time that they must be met by the owner, the record demonstrates that car owners have not generally viewed reimbursement with such precision as essential to equitable treatment. By spreading the recovery of capital costs over a 30-year period, the impact of car-hire charges on users has been mitigated and, although the immediate return to the owners has been somewhat lessened, the total receipts over the 30-year period have been greater than would have been received by using a

shorter period. In general, freight cars have been kept in active service at least that same length of time. Since all owners are users, and nearly all users are owners, the acceptance of the discrepancy between the manner in which the owner must meet the burden and the manner in which it is reimbursed, indicates an accommodation of interests which has produced a practical equity entitled to substantial weight in the disposition of these proceedings.

Where an owner finances a substantial part of the original cost of the car, and is required to meet annual payments of principal and interest spread over a period of 15 years, contributions from car users based upon a depreciation allowance spread over a period of 30 years require the owner to carry the difference between its payments and the annual contribution by users. This is additional contribution by the owner to the capital cost of the car which must be recognized. An allowance for interest on these added sums, and for inflationary impact thereon, is appropriate. The examiner concluded that reasonable compensation to owners would be accomplished by allowing interest and application of reproduction costs to 40 percent of the original cost over the 30-year period, and treating the remaining 60 percent of the original cost as funds upon which changes in dollar values had no impact upon car owners. In so doing he allowed car owners to recoup in the last 15 years for excess amounts paid by them during the first 15 years.

Table I, below, shows the approximate average annual costs per $1,000 of original cost where recovery of 40 percent is accomplished within 15 years, including interest at 4 percent; all other costs being spread over a 30-year period. Table II allows 60 percent as the financed amount and spreads all costs over the 30-year period.

In table I the reproduction cost index is applied only to the 40-percent average original investment of the car owner, while in table II it is applied to 60 percent of the original cost for the entire period.[3] In each table, taxes are spread over the 30-year period. Where 40 percent of original cost is treated as the investment of corporate funds by the owner, and 60 percent is spread over 30 years instead of 15, compensation is lower during the first 15 years per $1,000 of original cost is approximately $200 less than shown on table I. This amount is more than

recovered before the 20th year, however, and in subsequent years the additional amounts are sufficient to compensate for the use of the added fund.

Per diem charges constructed strictly in accordance with table I would result in substantial variations in revenues, with an excessive reduction occurring in the 16th year. We consider that charges generally constructed as shown in table II to be superior. The choice herein made is obviously not the product of exact measurement. Were the costs and apportionments involved herein susceptible of precise and indisputable calculations and application, there would be no need for recourse to this Commission. It is the existence of these numerous and extensive areas of imprecision, as well as the opposing theories as to methods of calculating and distributing the costs that make necessary the application of expertise and judgment. We find that allowance for inflation on 40 percent of the original cost over the 30-year depreciation period results in the payment by car users of just and reasonable compensation to car owners for the burden resulting from decreased purchasing power of their invested funds. See [illegible] 387 U.S. 326 (1967). As pointed out in [illegible] 329 I.C.C. 466, 478, the distinctions in relationships of the parties require treatment of this problem which, while differing, is not inconsistent with our conclusions herein.

Calculations of certain parties which purport to support higher per diem charges by allowing reproduction costs on the car owner's increasing equity over the life of the car are not persuasive. This increasing equity is a benefit which accrues to the owner by virtue of the contributions of the users. If the car is off line the entire year, the entire additional equity beyond the original owner's downpayment is paid by users. No logical basis exists for requiring them to pay also additional amounts due to the subsequent depreciation in purchasing power of funds which they themselves contributed and which funds were themselves raised to adjust for such changes. That the car obtaining line receives the benefit of sole ownership when purchase obligations are terminated gives it no additional right to payment from the others.

In fact, it is more common for cars to be off line only part of each year, and during the time they are on the owner's line

other railroads are not contributing to their cost. During these periods, however, the owner is the user and payments made by him on the purchase obligations perform the same function as contributions by other users. The end to be attained is the fair reimbursement of the owner for those amounts which it actually pays as owner, over and above contributions, or constructive contributions, which it makes in its capacity as user. The increase in its proportionate ownership of the car over the latter's operating life provides no measure of this amount. Notwithstanding the attempts made to suggest some differing relationship, we are of the view that the use of per diem freight cars is made pursuant to a relationship in the nature of a partnership, wherein all users, including owners, contribute their share of the ownership obligations, proportionate to the use made by them.

The index of freight car costs used as a measure of the reduction in the purchasing power of the invested sums is the product of a joint effort by the Association of American Railroads and the Commission's Bureau of Accounts, Section of Valuation, 16 and is one of several established after analysis of major construction contracts, reports by carriers, and information furnished by equipment suppliers and manufacturers. Some 44 separate indexes are published by the Section of Valuation and Depreciation to correspond with specific primary accounts of railroads, as set out in the Uniform System of Accounts for Railroad Companies. The index involved herein is that published for Account No. 53, freight train cars. It purports to show the relationship of prices for each year subsequent to 1914, using the prices in the 1910-14 period as 100. The index for each year is a composite figure based upon the percentage of each type of car and equipment in the account.

While the record contains little in way of detail as to the construction of this index, the testimony of a former Director of the Commission's Bureau of Transport Economics and Statistics that although extras are omitted, items such as wide doors, greater length, bigger volume, steel roller bearings, cushioned underframe, et cetera which are an integral part of new cars, are included in the average costs which underlie the index, was not contradicted. It also appears that the index includes other improvements which form integral parts of new cars such as improved metallurgical design of wheels, self-aligning trucks with one-piece cast steel pedestal [illegible] cast steel side frames with integral journal boxes, stabilizing devices, snubbing features built into side frames, wear plates in critical wear areas, journal roller bearings, improved coupler designed and draft gears design advances.

In a period during which no appreciable changes occurred in the design, size, or equipment of freight cars, the Account 53 index of construction costs might be treated as a reasonably reliable measure of reproduction cost and, under average economic conditions, of changes in the purchasing power of dollars invested in freight cars. In periods such as we have experienced since 1941, however, we think this index must be treated with caution and indications of inflation resulting from its application to original costs employed only as approximations. The

many changes in manufacturing processes, metallurgical developments, changes in design and structure, et cetera which have occurred are reflected to an immeasurable extent. Under these conditions, these approximations decline in validity as they are applied to more distant past years. Beyond a limited past period we are of the opinion that this index produces increases in reproduction costs which are so indeterminate as to render them unsatisfactory as measures of per diem costs. Thus, a more equitable method of allowing car owners to recover for the effect of inflationary forces is to make an appropriate increase in the rate of interest allowed on their invested funds which approximates the impact indicated by the index in more recent years but modifies the indication for more distant periods. In the following calculations, capital charges have been computed in this fashion.

INTEREST RATES

In addition to allowing application of the reproduction costs to 40 percent of the original cost, the examiner allowed an interest rate of 4 percent after taxes on the unreimbursed balance of 40 percent of the original cost. It is contended by some respondents that this was excessive, while others assert that it was too low. We do not find persuasive the evidence of interest on investment allegedly earned by car leasing companies, particularly in the absence of information as to the base on which it is earned, the accounting process which produced the asserted rate, and the extent to which an element of profit is contained therein. A most strenuous argument is made, however, that the per diem charge should contain an allowance for what has been referred to as "economic cost." In this respect it is argued that an allowance of 4 percent after taxes on that portion of the original cost of the car representative of the owner's investment of its own funds is inadequate. The cost of this "equity capital" is said to be much higher.

The general funds of the railroad company employed to make the investment in cars, in addition to retained earnings, are derived from long-term debt capital sources and proceeds from the issuance of stock. The cost of long-term debt capital is made up of the average yield, the premium necessary to attract buyers, underwriters' fees and corporation expenses of issuance

and distribution, less credit for income taxes, expressed as a rate of interest on the principal amount. While we have required to be stricken certain evidence first offered in exceptions, we note that, even if received, it would not warrant a finding that the allowance of 4 percent after taxes is inadequate to cover the costs of this source of corporate funds. A similar calculation of the costs involved in raising capital by issuance of stock, covering the corporation costs of issuance and servicing, underwriters' and brokers' commissions and discounts, and the necessary underpricing, would develop the rate necessary to compensate for this item, but no evidence is of record on this point. For reasons hereinafter mentioned, we are satisfied that costs of this latter type will also be adequately compensated by the allowances herein made.

The substantially higher rate of interest measured by the "cost of equity capital," as this term is used by the proponents, is supported by a theory which was rejected by the examiner as a method appropriate to evaluation of investment choices but inappropriate for application to the per diem calculation. The "cost of equity capital" which we are urged to adopt is not the cost which the railroad must incur to issue and market the stock, but is the interest rate thereon which states the discounted cash flow return to stockholders in the form of dividends plus market appreciation, adjusted upward by a factor for underpricing, underwriters' and brokers' commissions, and corporation expenses. This "cost" purports to measure investors' expectations and provide a yardstick by which to measure the utility to the company of future capital investments, in order to hold earnings up to the estimated expectations of investors, thus insuring maintenance of the company's financial standing and ability to obtain future capital inflow at costs acceptable to its particular management. Obviously, this "cost" includes all the profit obtainable or desirable from operations of the capital investment under consideration. There is no evidence that consideration of prospective net per diem revenue is so significant a factor in the financial planning of railroads when considering investment in new freight cars as to require rates generated by the method just described. On the contrary, it must be found that freight cars are built to meet anticipated needs of shippers and to earn freight revenues, and that little consideration, if any, is given to the possible income from per diem payments in the

decision to acquire cars. We find that the "cost" herein described may not reasonably be employed as part of the ownership cost of per diem cars for purposes of calculating the charges to users.

A rate of 4 percent after Federal income taxes is reasonably related to the return generally available from investments having similar risks. It compares with a return earned by railroads from freight service in 1960 of 4.5 percent after taxes and our conclusions in cases of similar reciprocal charges based upon cost, that 4 percent after taxes produced a fair return on value. *Switching at Richmond, Va.*, 245 I.C.C. 293, 298; *Switching Charges at Detroit, Mich.*, 301 I.C.C. 75, 82; *Routing Cancellation at Waterloo, Iowa*, 302 I.C.C. 477, 485. A fair return on the present value of the owner's investment requires consideration of the changes which are reflected in the Account No. 53 index of freight car costs and generally shown in tables I and II, *supra*. Employing this index as a guide, we conclude that interest at a rate of 9 percent before taxes on the portion of original cost herein allowed as representative of the average ownership investment, which produces approximately 5.5 percent after taxes, provides a fair return on the value of the investment, adequately compensates owners for the impact of inflation, and includes those elements of cost which should be shared by car users.

The average interest rate on outstanding equipment obligations developed by the 1960 studies was 3.849 percent. We agree with the examiner that a rate of 4 percent before taxes is reasonable for application to the portion of original cost of cars herein treated as funds not risked by the car owner and with respect to which the owner has a fixed liability. We find that allowance of 4 percent in this fashion is adequate on the average to reimburse car owners for interest payments which they must make on equipment obligations and constitutes just and reasonable compensation therefor.

The combination of an allowance of 4 percent on 60 percent of the original cost and 9 percent on the remaining 40 percent, produces a composite rate of 6 percent for application to the undepreciated balance of the original cost. A calculation based upon this figure appears subsequently herein as table B, and indicates cost which are closely related to those shown in tables I and II. The abrupt reduction in the 16th year shown in table I is avoided and, while charges are somewhat higher than table II in the earlier years, the speculative impact of the reproduction

cost index in the more distant years is mitigated. We find that an interest rate of 6 percent before taxes upon the undepreciated balance of the original cost of cars is just and reasonable compensation to car owners for all costs of interest on invested and borrowed funds, including a fair return on the value of their investment and allowance for losses in purchasing power of invested funds, under circumstances where per diem charges are calculated separately with relation to the actual original cost of cars.

COST BRACKETS

Compensation to owners would most nearly be accomplished by measuring the car rental rate for each car according to its particular cost. Such a method would require rate schedules so complex as to defeat their purpose, however, and some grouping of cars is essential to a practicable system. To be reasonable, the groupings chosen should be so constructed as to contain cars having values reasonably related to the value employed to compute the rate for that group. The groupings, or value brackets, employed in constructing the AAR multilevel rates are challenged as unreasonable both because of their size and because the rates applicable to some are weighted to reflect the preponderance of cars in the lower portion of the bracket. The analysis of 974,386 cars used by the AAR in developing these brackets and rates is set forth below. Values shown are based on the average original cost, plus additions and betterments, depreciated, as of December 31, 1961.

Value group	Number of cars	Distribution
1		*Percent*
$1,000 and less	380,851	100
2		
1,001– 2,000	150,160	36.94
2,001– 3,000	112,112	27.58
3,001– 4,000	77,776	19.14
4,001– 5,000	66,406	16.34
		100.00
3		
5,001– 6,000	39,031	24.58
6,001– 7,000	36,459	22.96
7,001– 8,000	40,461	25.50
8,001– 9,000	26,818	16.89
9,001–10,000	15,992	10.07
		100.00

Value group	Number of cars	Distribution
		Percent
4		
10,001–11,000	11,155	43.24
11,001–12,000	6,930	26.87
12,001–13,000	4,999	19.38
13,001–14,000	1,939	7.52
14,001–15,000	770	2.99
		100.00
5		
15,001–20,000	1,280	No analysis
6		
Over 20,000	1,247	No analysis

It is pointed out that, with brackets of this width, cars having actual values placing them at the upper end of the bracket do not receive compensation for their true costs. An example is a TOFC car valued at $13,253, assigned to bracket No. 4 when installed in per diem service, which would recover in that year as interest, using 6.62 percent, approximately $768, compared with $877 based on its actual cost. The rates applicable to bracket Nos. 1, 5, and 6, [17] were based on the average ownership costs, using the reproduction value basis. In bracket Nos. 2, 3, and 4, however, the cars were arranged in subgroups of $1,000 each, as shown above, and the weighted average used. Thus, in bracket No. 4, the arithmetical average of the five subgroups is approximately 474.22 cents per active car day, while the rate of 450 cents results from the preponderance of cars in the lower portion of the group. The rate reflects the cost, as computed by the AAR, for a car of slightly under $11,000 in value. Of some 25,793 cars in this group, over 7,700, or nearly 30 percent, have values exceeding $12,000 and would not be compensated by rates measured by the costs of an $11,000 car. Using as a basis the same AAR calculations which underlie the multilevel rates, cars having values between $12,000 and $15,000, which receive $4.50 per day, incur costs between $4.70 and $5.24 per day. In bracket No. 3, cars receiving $3.58 per day incur costs ranging from $3.38 to $4.12 per day.

The applicable rates under the AAR multilevel plan change throughout the life of the car by reference to the assumed reduc-

[17] Bracket No. 6 as used here refers to the original publication of January 1, 1964, in which this bracket encompassed all cars over $20,000 in value.

tion in the car's value as measured by its depreciated original cost. Since the method contemplates the annual reduction in the car value it comprehends a period of time when its value exceeds that of the weighted average, and a subsequent period of time when its value will be below that upon which the rate is calculated. To some extent, therefore, the lack of full compensation during the period the car is valued at more than the weighted average car in the bracket is balanced by the excess of compensation during the period the car is below that value. Under this system, however, it will generally be equal only by coincidence.[18] Value brackets which are of such breadth as to apply a single rate to cars having costs of the variability indicated by the AAR calculations are productive of charges which are unrelated to the ownership costs, and are unreasonable.

The use of changes in the depreciated balance of the original cost of each car as basis for changes in the rates was found by the examiner to produce an erratic progression from rate to rate and, taken in connection with the substantial difference in rates in each bracket, unreliable as a measure of changes in the ownership costs. The progression of cars through the AAR multilevel value brackets, and the returns obtained while in each bracket, are not shown to have any relation to the progression of changes in the costs of ownership in those periods or any consistent relation to the actual amounts of such costs. The more particular consideration of the costs of acquiring cars which we have found necessary under present conditions and the fact that such costs vary with time rather than with a depreciation schedule lead us to conclude that any schedule of changes in rates over the years a car is in service should be measured directly by the passage of time.[19] A system making use of the latter method places a car in a value bracket based upon its original cost, where it may remain. Since there is no progression downward through the bracket in such case, it is even more important

[18] Taking the $13,254 car mentioned above as an example, this car would depreciate $397.60 per year, allowing 10 percent for salvage. For the first 6 years its value would exceed $11,000. In the 7th year it would approximate the weighted average, and in the 8th and 9th it would be below. In the 10th year it would drop to the next lower bracket, having received 6 years of varying undercompensation in exchange for 2 years of varying overcompensation.

[19] Measurement of car age is required under the AAR multilevel system in order to use the Account No. 53 index in setting the reproduction cost ascribed to cars in each value bracket. Evidence of car leases with the Equitable Life Assurance Society between 1950 and 1962 show rates graduated with the age of the car, separated into five 3-year periods and one 10-year period.

that the value used to calculate the cost of each bracket closely approximates the cost of the cars therein. Necessarily, narrower brackets are required. We find that brackets no more than $2,000 in width with rates calculated upon the middle value of each, are necessary to satisfy this requirement.

ADDITIVES

Classification of cars into nine groups under the present multilevel rates is based upon their original cost plus additions and betterments, depreciated. Where cars were built or rebuilt in the carriers' own shops, this base figure varies due to differences in accounting systems and the extent to which all costs associated with the construction were capitalized. Among the items sometimes omitted in first establishing the original cost were payroll taxes, vacation pay, holiday pay, health and welfare, shop and power plant repairs and maintenance, shop depreciation, et cetera. On May 6, 1963, the AAR issued instructions and reporting forms designed to adjust the original costs as first reported, so as to reflect the omitted items. These instructions and forms were revised by a second letter on June 25, 1963. The amounts reported in response thereto are referred to as "additives."

Southern Railway contends that the use of additives to increase the original cost fugure is unlawful because not authorized by vote of the members of the per diem agreement. It is also contended that the system established by the AAR to revise the original capitalized cost of cars by use of additives lacks a uniform basis, lacks consistency with rational accounting policies and practices, and fails to provide an effective audit. It is said to violate accepted cost accounting principles and to introduce such error into charges under the multilevel rates as to render them unreasonable and unlawful.

Since we have found it necessary to prescribe the per diem methods to be used for the future, it is not necessary to give detailed consideration to these issues. Classification of freight cars into value brackets shall, for the future, be on the basis of their original cost, undepreciated, determined in accordance with the Uniform System of Accounts for Railroad Companies, prescribed by us in accordance with section 20 of the act and set forth in 49 CFR chapter 1, subchapter A, part 10. To the extent that these

regulations do not include items of expense which might be capitalized under appropriate controls, the respondents may take appropriate steps to request revisions which they deem appropriate.

When the multilevel rates became effective on January 1, 1964, there was included a method of reporting which attempted to compensate owners for the extra cost of additions and betterments. Additions and betterments made prior to the time the cars were first reported for inclusion in the master list were coupled with the depreciated cost of the car and additives, if any, to establish the value bracket in which it was to be placed. Subsequent additions and betterments were to be reported on change reports and added to the original valuation, with the anticipated result of either moving the car to a higher bracket or retaining it for a longer time in its then present bracket. Prior to the institution of the multilevel rates, in 1964, the per diem rates and underlying calculations did not purport to reimburse the owner specifically for such costs. Very little evidence was introduced to assist the Commission in dealing with these costs, and the record suggests that owners have not been particularly concerned with obtaining reimbursement for them. Nor are they provided for in the per diem system suggested by Southern Railway in this proceeding.

We agree with the finding of the examiner that the procedure employed under the AAR multilevel system is inadequate. In his recommended report and order the examiner suggested another method of reimbursing owners but noted that other methods, or evidence that it would be more economical to ignore these costs, should be brought to the attention of the Commission. No significant attention has been given to this matter by the parties in their subsequent pleadings and, upon the record, we conclude that there is not sufficient interest on the part of the respondents in recovering these expenditures by way of per diem contributions to justify provision therefor at this time.[20]

IMPACT OF MILEAGE

For over 60 years the annual ownership burden has been distributed among car users based upon the number of days each

[20] We note that expensing of such of these costs as may be permitted by current regulations makes them a part of the overall costs entering into calculation of the per diem rate and may, in the light of tax considerations, be considered preferable by the respondents.

had the car on line. It is not disputed, however, that a substantial portion of the repair and maintenance expenses arises from and is proportionate to the amount of use to which the car is put while on line, rather than to the days held. By most respondents, this use is grouped into three categories, i.e., line-haul movement, switching movement, and loading and unloading. No practicable method was shown by which repair expenses due to loading and unloading activity could be apportioned among the car users other than by time on line, as at present. A similar conclusion is required with respect to switching service. It is contended that switching service causes substantially more damage to cars per mile of movement than does line-haul mileage but the evidence is conflicting on this point.[21] Records are not maintained of mileages of cars in switching service and we do not consider it practicable at this time to require that this be done. We find that distribution of repair and maintenance expenses which arise from switching service and loading and unloading activities in relation to the number of days cars are held on line will provide a just and reasonable sharing of these costs.

The use made of cars involved in line-haul movement is susceptible of measurement, however, and the record herein shows that the average distances active foreign per diem cars are moved by the respondents vary widely. Differences of as much as 100 miles are shown by the 1960 special studies, a few of which are shown below.[22]

Carrier	Daily average mileage
L. I.	4.8
NY,NH&H	34.6
B&O	44.5
B&M	51.2

[21] The Section of Cost Finding employed a factor designated "equated switching miles." This is an artificial figure which must be estimated due to the fact that records are not maintained of car-mileages in switching movements. It was developed from data in Rail Form A, which indicated that for each locomotive mile in switching service, there were 3.3 car-miles. The mileage is then further increased by application of a "rough usage" factor of 2.6 intended to represent the relationship of wear and tear on the car in switching service to line-haul service. The result is to increase locomotive miles in switching service 8.6 times, to develop car-miles in switching service. Validity of the "rough usage" factor was not shown.

[22] Movements of particular scheduled trains of as much as 450 miles per day occur.

Carrier	Daily average mileage
PRR	51.3
NYC	51.8
C&O	53.9
L&N	59.5
ACL	62.8
N&W	66.6
C,B&Q	75.2
Sou. Ry	70.4
MP	80.1
NP	81.4
SP	112.4
ATSF	113.2
UP	120.9

Line-haul mileage also furnishes an indication of the benefit which car users derive from per diem cars, since the divisions which carriers receive of the freight revenues are customarily based in large part upon distance scales. Factors prescribed by the Commission for application to rate scales in ascertaining these divisions increase with increases in distance. As discussed hereinafter, line-haul mileage has an appreciable impact upon reduction in car value and cost of repairs, both of which are factors entering into the per diem rate. It is of importance therefore both due to the greater revenues obtained from the transportation of the car over longer distances and to the greater impact on the ownership burden which results from the longer movements.

The record includes 19 analyses of car repair and maintenance costs, a description of which appears in the appendix to this report. Most of these were calculated by separate consideration of each portion of the car, the factors which cause wear or damage, and the relative extent of each. They were not, however, based upon tests or studies of equipment in operation under test conditions. The proportions assigned to the various causes were determined by the judgment of the engineering official or officials responsible therefor in each instance. The conclusions of the Section of Valuation and Depreciation represent the judgment of staff personnel in revising a similar allocation made in 1940, and published in statement No. 4-54, November, 1954. Comparison of the individual judgments reveals appreciable and irreconcilable differences of opinion as to the cause of particular repairs and to the totals

in each group. Even when the carriers are grouped by the broad geographical areas in which they operate, or their type of service, no consistent pattern appears.

The lowest estimate of the percentage of repairs caused by line-haul mileage in these analyses is about 20 percent. The average of estimates for all three classes of cars is about 38 percent, and the majority of the estimates for this factor are between 30 and 40 percent. Estimates by the Pennsylvania Railroad, and those used by the Section of Cost Finding, do not separate switching from line haul, but employ approximately 70 percent as the combined effect of these two causes. Although the repairs necessitated by switching service are considered, by many witnesses, to exceed those necessitated by line-haul service on a mile-for-mile basis, there is no agreement as to the extent of the difference. Equated car-miles of per diem cars in switching service, as calculated by the Section of Cost Finding for 1960, were 2,114,616,465, while total line-haul and equated switching miles were 23,790,915,732 The approximate 10 percent of equated switching miles indicates that about 63 of the 70 percent repairs assigned to the two causes was related to line-haul mileage. Both the Pennsylvania and the New York Central, which also estimate a high proportion of repair costs to line haul, are proponents of the use of mileage as a measure of allocating the ownership burden among users. The 16 respondents which joined in the studies summarized in the appendix are all opposed to this procedure. Some of these respondents, however, estimated that line-haul mileage causes from 46 to 60 percent of repair costs. The examiner found that 50 percent of annual repair costs might reasonably be treated as related to the line-haul mileage over which the cars are moved.

This finding is challenged as being a judgment figure, unsupported by the evidence. We are satisfied from a review of the entire record that a judgment decision is required by the very nature of the problem. All the evidence is based upon judgment of the witnesses. The record is convincing that line-haul mileage is the cause of a significant portion of the repair and maintenance costs of cars, that no objective standard of demonstrated reliability exists to ascertain the proportion, but that a considered evaluation of the judgment of a number of experienced witnesses provides a basis for reaching a reasonable and equitable conclusion. We find that the usage made of

foreign per diem cars, measured in terms of line-haul mileage of active cars, is so varied as to require separate treatment and is a significant factor which must be reflected in the distribution of the annual burden among users of the cars. We further find that 50 percent of the annual repair and maintenance costs should be distributed among car users in relation to the line-haul miles over which they move such cars.

It is contended that since regular repairs are made at current prices, freight cars do not lose value because of physical deterioration, and the loss in value charged to depreciation is caused by obsolescence due solely to the passage of time. That a freight car can be kept in useable condition for extremely long periods of time by frequent repairs and careful maintenance does not alter the fact that at the time it is retired it has a salvage value which is only a small percentage of its original value. It cannot be found that repairs during its operating life bring it back regularly to the value and condition it possessed when new. The decision to retire a car, or group of cars, involves the balancing of a number of factors, and a determination as to whether more profitable future operations will result from expending funds to keep the cars in operation, or in expending such funds to purchase replacements. Inherent in the analysis is consideration of the physical condition of the car, the extent of deterioration, and the cost of keeping it in useable condition. The theory that no part of the loss in value of a car at retirement results from deterioration in its physical condition and ability to perform adequate service, due to wear and tear in use, cannot be accepted. Use of the term depreciation as a word of art in the accounting field, to mean a charge made on a time basis without regard to use, does not foreclose consideration of the causes of the loss in value.

Both the annual repair and maintenance costs and the loss in value of the car not restored by such repairs are found to be directly affected by the use made of the car. The evidence on the latter point is limited to an analysis by the Commission's Section of Valuation and Depreciation and is based upon a value per pound concept similar to that employed by the respondents in settling claims among themselves for destroyed cars. The Section of Valuation and Depreciation calculated the combined effect of line-haul and equated switching miles as the cause of 45 percent of loss in value of the car. Applying the ratio of equated switching miles to total miles mentioned above, we

find that 40 percent of the loss in value is properly allocated to the effect of line-haul mileage and should be so distributed among car users. For the reasons heretofore stated, the remainder of the depreciation charge must be assigned to time on line.

In the allocation of various cost items between time and mileage, the examiner found that charges for depreciation, interest, and taxes on repair facilities, payroll taxes, and interest on working capital should be assigned solely to time. Considered individually, each of these items appears more closely related to the passage of time and, in most cases, it is difficult to attribute any portion to the direct, measurable impact of car-mileage. Nonetheless, all of these items constitute overhead on the repair expense, which is shown to have a direct and reasonably measurable causal relation to mileage. While the difference in the result is not great, we believe it feasible to treat the charges associated with the repair function in the same fashion and to distribute these particular items between time and mileage in the same proportion as the direct repair costs. In the calculations which follow this procedure has been employed.

Proponents of rates measured solely by the number of days the user retains the car contend that the benefit therefrom in encouraging the movement of cars and assert that this method most effectively aids the national policy of improving car supply and service. We have already called attention to the fact that our function in this proceeding is to determine reasonable rates which must be fair and equitable to all parties. Secondary results, however beneficial, cannot be transformed into a principle to govern the determination of the rates in this case.

It is also asserted that the respondents desiring calculations of the rates solely upon a daily basis outnumber those who seek rates measured both by time and mileage. The accuracy of this assertion cannot be determined since we do not have of record the positions of numerous short lines. Our duty herein cannot be discharged merely by reference to the desires of a majority, no matter how great.

Considerable emphasis is placed upon the simplicity of the time-only system and the added cost involved in accounting for mileage of cars. Calculation of rates on a mileage basis is employed by the respondents with respect to many cars, particularly refrigerator and tank cars. Maintenance of records of

car-mileages by car is an established function of the respondents' staffs. At least one respondent, the Chicago, Milwaukee, St. Paul & Pacific, maintains mileage records of all cars, including foreign per diem cars. The record reveals that with few exceptions, automatic data processing machinery is employed for this as well as other elements of per diem accounting. As of March 31, 1964, owners of approximately 1,180,000 cars in interchange service employed tapes and high-speed computers to process the car rental calculations. Owners of 303,513 cars employed punch card data and appropriate processing machinery. Only about 62,171 cars appeared to be still processed manually. Recording and reporting procedures designed to handle the relatively new multirate system are in operation, including a system of reporting costs of cars to the AAR for classification in value groups. Master lists of the cars in per diem service and periodical revisions thereof are issued in form suitable for computer application. It is found that the respondents are capable of administering a system of rates based both upon the time foreign cars spend on line and the mileage traveled.

Fourteen respondents submitted estimates of the additional costs they expected to incur, separated between costs of data processing, car accounting clerks, and traveling auditors. Of the total costs as then estimated, on an annual basis, after reprogramming and other one-time costs are met,[23] the data processing amounts to slightly over $400,000 or about 15 percent of the total. Additional car accounting clerks are estimated to cost over $950,000 annually, or about 37 percent of the total, and traveling auditors some $1,245,000, or 48 percent. By applying the relationship of per diem payments and receipts for all class I line-haul railroads for the year 1961, to the payments and receipts of these 14 carriers, it is estimated that the overall additional costs to account for mileage of foreign cars, as well as time, would exceed $8,300,000 per year.

This amount is challenged by the Pennsylvania Railroad. Like most of the others, the Pennsylvania considers that additional time of computers and related machines would be required, as well as additional operators; that additional car accounting

[23] Only four carriers in this group indicated their expected one-time costs for the data processing function. C&O estimated $20,320, D&RGW estimated $750, UP estimated $15,000, and SP estimated $20,909.88.

clerks would be necessary and that traveling auditors would be required to check the records of PRR cars on foreign lines. It points out that a change to a time-mile system would require revisions in the rules governing per diem settlements, just as changes were required in 1964 when the multiple-level system was substituted for the single-rate system. Applying the suggested revisions to its own operations, it estimates additional costs of $109,000, and savings of $30,000, for a net of $79,000 in extra costs for time-mileage accounting. Expanded in similar fashion as was used by the 14-carrier study, the Pennsylvania estimates the increase for all class I line-haul carriers at not over $1 million.

The additional employees and costs for data processing are required by and related to the additional accounting for foreign car movements on line. The additional costs for traveling auditors arise because of the desire to check mileages of owned cars when off line. Services of additional car accounting clerks are required by functions related to both causes.[24] The estimates of these additional costs are based on the judgment of officials of the carriers and contain many conflicts and inconsistencies.

The largest single item of additional cost is the provision of traveling auditors to investigate the records of other railroads as deemed necessary to insure receipt of all earned per diem payments. This is considered necessary since the owning railroad will not have a record of the distances its cars travel over other lines and will have no other method of checking on statements of amounts payable by such lines. The auditing of mileage records would be accomplished on a sampling basis, and it is generally conceded that as experience proved certain carriers' records to be reasonably reliable, auditing of their accounts would be reduced. The volume of the records involved in this process is such as to render improbable any concerted falsification of accounts, and no contention is made that carriers would engage in such practices. By the same token, the number of records, and the number of employees participating in their making, makes errors not improbable. Individual errors in mileage reports would not ordinarily be substantial in amount,

[24] The additional car accounting personnel will perform some functions involving correspondence with other lines regarding car rental claims, but their anticipated primary activity will be checking on omissions of foreign car movements appearing in wheel reports on their own lines.

however, and it is unlikely that the sums allegedly required for auditing as estimated by several of the carriers would be justified by the recoveries they might develop.

Many respondents expressed disapproval of delegation of the auditing function to an outside group. Most felt that each railroad should look after its own interests. While this system was feasible under the system of single daily rates prior to 1964, it deserves reconsideration in the light of present conditions. Auditing of car-mileages by each railroad separately suggests an operation both inefficient and uneconomical, and one which might be better performed by an independent organization.

No evidence was offered to show the total costs of accounting for per diem by individual or all carriers, either under the single rate which prevailed prior to 1964, or under the present multilevel rates. Per diem payable in 1960 by all carriers amounted to $679,506,750, and in 1961, $731,000,998. The analysis presented by Pennsylvania Railroad suggests that the additional cost of the time mileage accounting will be less than one-seventh of 1 percent of the total sum involved. Even if the figure computed by those opposing the mileage system is accepted, the amount is little over 1 percent. We find that recognition of the line-haul mileage factor is feasible under present conditions and can be accomplished without unreasonable increase in the difficulty or cost of reporting and accounting.

CAR DAY DIVISOR

Reduction of the total annual cost of car ownership to an amount per car per day requires ascertainment of the number of car days to be used as a divisor. It has been customary to exclude from total possible car days, the car days of cars on owner's lines which are unserviceable and of those which, for lack of employment, are considered surplus. In this fashion, the cost of the per diem fleet is spread over and borne by the cars held by users or being used by the owner. Two special studies in 1960 were carried out to supply working data for this purpose. The first provided a 7-day sample of car-miles, a 12-day sample of number of serviceable freight train cars on line, a 7-day sample of number of "No-Day" cars[25] on line

[25] "No-Day" cars are those for which no per diem charge accrues due to their being received after midnight and delivered before the succeeding midnight.

and of cars out of service due to repairs. The latter sample was subdivided so as to show separately cars on repair tracks undergoing or awaiting repairs, cars on repair tracks repaired and awaiting switching, cars on storage tracks awaiting switching to repair tracks, cars held in train yard awaiting movement to repair tracks, cars moving empty in trains en route to shops, cars stored awaiting disposition, and other cars.

Another 7-day sample was taken of surplus per diem cars, also subdivided to show the cause. Surplus cars were ascertained by a count of serviceable empty cars on hand at 12:01 a.m. of the next day following a test day which had not been placed for loading, and a similar count made 48 hours later of those same cars to establish the number which had not been placed for loading in the meantime. Another study called for a report from the carriers, subdivided by type of car for the year 1960, showing per diem payments and receipts, and reclaim payments and receipts, together with a report of per diem receivable by type of car, for cars on railroads outside the United States.

In developing the car-day divisor for 1960, the Section of Cost Finding averaged the total freight train cars in service at the beginning and end of the year to obtain 1,685,910 cars. Analysis of the special studies and reports heretofore described developed that 44,710 of these cars were not in per diem service, leaving 1,641,200 as the average number of per diem cars in service in 1960. There was thus indicated a possible 600,679,200 car days of per diem cars for the year. The studies of bad order cars and surplus cars developed deductions of 59,029,930 car days and 68,565,413 car days, respectively, owing to these two causes. The balance of 473,083,857 active car days, divided by 1,641,200 cars in service, produces 288.25 active car days per car for the year 1960.

The active car days per car furnishes a measure of the days, on an average that each car was engaged in revenue producing service but it is not a satisfactory measure of the days over which ownership costs should be spread. Per diem payments by users of foreign cars are made, with unimportant exceptions, for each day a foreign car is on line, whether or not in a surplus or bad order category. Payments are thus made for days excluded in the calculation of the total active car days. Since car owners are users of their own cars and, when in such capacity, should bear the user's share of ownership costs, fairness to all users requires that total ownership costs be

spread over the total days for which payments are or should be made. The 1960 studies indicated a total of 223,887,324 active car days of per diem cars on foreign lines, and a total of 237,908,943 days for which per diem was paid for such cars. The indicated ratio is 1.06263. Application of this ratio to the total active car days of all per diem cars in 1960 produced a car-day divisor of 502,715,000 per diem payable days, or about 306 per diem payable days per car for that year. Development of the car-day divisor in this manner credits all users, including owners when using their own cars, with the same relative proportions of surplus and bad order car days, while excluding the great majority of surplus and bad order car days of cars on home lines. Costs of the home bad order and surplus cars are thus spread over the payments made for the cars in use.

Certain respondents contend that distribution of the annual car costs should be accomplished by use of a car-day divisor developed by application of a fixed ratio of active cars to all cars, and recommend that 80 percent be established as the ratio to be applied. We are satisfied from the record that the car-day divisor is a factor of such significance in the distribution of per diem costs as to require more care in measurement. The determination to be made is the cost per day, to be employed to measure the adequacy of the existing rates and the need for any change. It is essential that the car utilization for the specific years be employed and no sound basis is shown for ignoring it. Its importance is underscored by evidence which indicates that further studies may demonstrate a need for use of different divisors for cars of varying types or values.

The car-day divisor employed in developing the A.A.R rates has been constructed by multiplying the 20-year average of the annual ratios of active to total cars by the number of days in the year to obtain the active car days per car per year. The figure for active cars has included all cars owned or leased in the year less bad order and surplus cars on lines of owners. For application to the total costs, the active car days per car has been multiplied by the average number of cars in use during the year. Surplus cars, both home and foreign, are based upon estimates of the empty cars on hand at loading stations at the end of each day in excess of the number needed for loading the next day. The portion thereof estimated as being foreign cars is determined, and excluded, by application of a percentage based upon a 7-day test check made in 1956,

the validity of which was not shown. Based upon a test check in 1949, the reported bad order cars are adjusted by a percentage to reflect home cars in this category not reported in regular AAR reports. Accuracy of this adjustment was not shown. The divisor also includes cabooses and other cars not used in per diem service. We find that the procedures used in the 1960 special studies are more reliable and productive of more accurate development of car-day divisors.

The 1960 studies developed the ratio of per diem payable days to total active car days by use of the days for which per diem payments were made for foreign cars. The studies showed that this figure was substantially the same as the total car days of foreign cars, the difference being about four-tenths of 1 percent. We find that the total car days of foreign cars may be employed to determine the ratio of constructive per diem payable days to total active car days of all per diem cars, and that it is unnecessary to develop separately the per diem days paid for foreign cars for this purpose. The total per diem payable days for the year under consideration shall be determined by multiplying the total active home and foreign per diem freight train car days by the ratio which the total foreign per diem car days, both serviceable and unserviceable, bears to the total active foreign per diem car days. The per diem payable days per car to be used as the car-day divisor for the year under consideration shall be determined by dividing the last-mentioned figure by the average number of such cars in service in the year.

The procedures herein prescribed require also the calculation of a car-mile divisor in order to equitably spread the costs attributable to line-haul mileage. The 1960 studies suggest that variations may occur in utilization depending upon the type of car but the evidence of record is not sufficient to support findings with respect thereto. We conclude that, for the present, the average car-mile divisor, based upon the experience of all active per diem cars, must be employed. The respondents may, if they deem it necessary, bring to our attention evidence of a need for separate determination of car-mile or car-day divisors.

The total line-haul car-miles of per diem cars in 1960 developed by the special studies was 21,264,599,477. Divided by the average number of such cars in active service, 1,641,200, indicates an average per car for the year of approximately 13,000 miles. We find that the car-mile divisor applicable to

per diem cars shall be determined for the year under consideration by dividing the total loaded and empty car-miles of per diem freight train cars by the average number of cars in service in the year.

Changes in economic conditions and demands for railroad service produce variations in the number of active car days and average line-haul miles per car from year to year. Since these figures are the divisors which reduce the annual costs to the daily and per-mile rates applied to each car, they are critical to the process with which we are concerned. It is generally accepted that frequent and violent revisions of the per diem rate are not desirable. An important consideration is the fact that while a high rate of economic activity increases the active day and mileage divisors so as to produce a lower rate, a period of recession has the opposite effect. In the latter instance, the divisors might be so reduced as to result temporarily in substantially increased rates, a consequence which is similarly undesirable. Mitigation of such possible extremes is accomplished by using average conditions. The AAR has experimented with the use of 5-, 10-, 15-, and 20-year periods to estimate the car utilization to be anticipated in the future, but there is no evidence that these periods measure the average of current car demand conditions or the norm of economic cycles.

In the light of current conditions and the continuing improvements in railroad operations and equipment, a shorter period should be more reliable and responsive. We find that a 3-year moving average will be adequate to absorb temporary fluctuations in economic conditions while reflecting longer term changes in utilization and costs. It will be employed herein to determine the car-day and car-mile divisors, and the average annual cost of repair and maintenance.

METHOD FOR FUTURE CALCULATION

We find that just and reasonable per diem rates shall hereinafter be calculated in the following manner and subject to the following instructions.

Per diem rates shall be calculated using data for the last calendar year, and for the 3 most recent years as herein prescribed, to develop necessary statistics. Whenever such calculations indicate a need for revision of the rates, the fact shall promptly be brought to the attention of the Commission.

For the purpose of the per diem calculations, freight cars shall be classified according to the original capitalized cost, without allowance for depreciation, subject to the Commission's accounting regulations. Where cars are rebuilt and assigned new car numbers, the original cost shall be the cost as capitalized pursuant to current accounting regulations. Per diem rates shall be so calculated as to reflect differences in the original cost of the car, and differences in the annual ownership costs due to the age of the car in service. Original cost brackets shall be $2,000 in scope, as shown in the following computations (table C). Brackets covering age in service shall be 5 years in scope, as shown in the following computations (table B).

Age in service shall be calculated as follows:

(1) Cars installed prior to July 1 of any given year shall be considered to have commenced their first year in service on the preceding January 1.

(2) Cars installed after June 30 of any given year shall be charged at rates applicable to the first 5 years of service until the expiration of 5 years from the following January 1.

Per diem rates shall be separately calculated, assessed and paid with respect to the number of days cars are held on line, and with respect to the number of miles such cars are moved by users in line-haul service, such calculations to be made in conformance with principles and methods found herein to be just and reasonable. Respondents will be expected to take appropriate action to accurately record days on line and line-haul mileage of foreign per diem cars. Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt shall be disregarded and payment made for the day of delivery. A road receiving and delivering a car on the same date shall not pay the daily per diem charge for that day but shall pay the appropriate charge for the line-haul mileage.

The rate applicable to each original cost bracket, except the first, shall be that applicable to the middle thousand-dollar figure thereof, herein referred to as the bracket figure, as shown in the tables which follow. The amount of annual depreciation, or recovery of original cost, of cars in each bracket shall be 3 percent of the bracket figure. Forty percent of this annual cost shall be assigned to line-haul mileage, and the remainder to the daily charge (table B).

A fair return on value shall be recovered annually by allowance of interest on invested capital. The total amount, including interest costs on freight car obligations, shall be assigned to time and shall be taken at 6 percent of the average undepreciated balance of the original cost for each 5-year period for which charges are computed (table B).

The total amount recoverable annually on account of property taxes shall be assigned to time. The ratio which all property taxes for the most recent year bears to the total railroad investment for that year shall be employed to estimate this item. The amount shall be determined by application of this ratio to the midyear value based on depreciated original cost for the middle year of each time period (table B).

The total amount recoverable annually on account of repair and maintenance costs shall be taken as the same for all cars and shall be apportioned 50 percent to time and 50 percent to line-haul mileage. All costs which are treated herein as overheads on repair costs shall be apportioned between time and mileage in the same fashion as repair and maintenance costs.

The method employed by the Section of Cost Finding to ascertain repair and maintenance cost in its analysis of 1960 cost data is based upon the most recent information with respect to extent and allocation of the various items and is embodied in summary form in a publication entitled Rail Form H, 7—62, Formula for Use in Determining Per Diem Charges For the Use of Freight-Train Cars. This form, introduced in evidence as exhibit R—5, is available to any interested person through the Bureau of Accounts of the Commission.

Employing data from Rail Form A for the year under study, and ratios and apportionments from the 1960 studies, schedule 1 of Form H separates the annual costs between per diem freight train car ownership costs, other expenses, and general overheads. Footnotes to schedule 1 contain forms to be used to calculate payroll taxes, property tax ratio, cost of handling nonrevenue freight, costs of switching bad order cars, return on investment in property other than freight-train cars, and return on working capital.

Repairs to freight train cars, account No. 314, were apportioned 75.334 percent to ownership costs based primarily on the Forms 2 and 3 studies in 1960. Other 1960 ratios and apportionments to ownership costs in schedule 1 include:

Account No. 302—Repair, shop machinery	34.170%
304—Repair, power plant machinery	22.203%
305(44)—Depreciation, shop machinery	34.170%
305(45)—Depreciation, power plant machinery	22.203%
503—Hire of freight cars (net)	
536—A. R. schedule 376, lines 7, 8, 9, columns c, d, e, f	73.752%
235—Repair, shops and enginehouses	27.317%
253—Repair, power plants	24.645%
257—Repair, power transmission systems	18.722%
266(20)—Depreciation, shops and enginehouses	27.317%
266(29)—Depreciation, power plants	24.646%
266(31)—Depreciation, power transmissions system	18.722%
326—Work equipment repairs	3.057%
328—Miscellaneous equipment repairs	6.551%
507/540—Work equipment rent (net)	3.056%
402—Train supplies and expenses payroll taxes	13.876%
Payroll taxes	8.925%
Property taxes (property other than freight cars)	1.410%

Ratio of ton-miles of nonrevenue freight in road service applicable to equipment repair	0.11046
Freight service portion of cost of handling nonrevenue freight used for equipment repair	78.484%
Percent of freight service portion applicable to ownership cost of per diem freight train cars	42.995%
Ratio of return plus Federal income taxes to return excluding Federal income taxes	1.65505
Ratio of revenue freight portion of total freight operating expenses to total freight operating expenses	0.99600
Ratio of switch engine hours switching bad order cars to total switching locomotive hours	0.4408
Percent of cost of switching bad order freight train cars applicable to ownership cost of per diem freight train cars	85.950%
Return on depreciated investment in property other than freight train cars	0.891%
Return on working capital	10.075%

For application to data of years other than 1960, the following changes are made in schedule 1:

In footnote 21, line 5, the source of the ratio is changed to footnote 22, line 8, column (3), and the ratio 1.65505 stricken.

Footnote 23, line 9, column (3) shall contin a source reference which reads "footnote 22, line 9, column (3)," and the ratio 6.620% contained in column (4) is stricken.

Schedule 1 is so designed as to permit the application of ratios and apportionments developed in the 1960 studies to the data of the year under analysis. Many of these ratios and apportionments required extensive reports on the part of all participating railroads and are of such nature as to have a relatively minor effect on the ultimate per diem charges. At the same time, the activities to which they refer are of such nature as to produce substantially similar effects over long periods in the absence of radical changes in railroad operations. We conclude that the ratios and apportionments developed in the 1960 studies, not revised specifically in this report, may appropriately be used for present and future per diem cost calculations but that the respondents may, should they deem it necessary, bring to our attention at any time the need for further studies. Certain ratios are developed from data available from annual reports and use of the Rail Form A formula. No reason appears why these cannot be conveniently recomputed annually without undue effort.

We find that the method of calculating ownership costs for repair and maintenance of per diem freight train cars set forth in schedule 1 of Rail Form H, 7—62, is just and reasonable, and subject to the foregoing qualification respecting future studies, is and will be productive of a fair assignment of such costs as necessary to just compensation of car owners.

The repair and maintenance costs as separated and analyzed in schedule 1 of Rail Form H for each year shall be summarized and separated between mileage and time portions as shown in table A, below. This statistical summary table contains certain additional items which, to the extent not already mentioned, shall be ascertained as set forth below. Where the necessary data are not available through current procedures, additional reports shall be made as prescribed. Appropriate revisions of standard reporting forms will be made as indicated.

(1) The total per diem car days for the study year shall be the average number of per diem freight train cars multiplied by the number of days in that year.

The average number of per diem freight train cars in service, both owned and leased from others, shall be the average of the number of per diem cars reported by class I line-haul railroads in railroad annual report form A, schedule 417, Inventory of Equipment, Freight Train Cars, in service of the respondent at the beginning and the end of the year. Schedule 417 shall be

revised for the reporting of freight train cars by types of car design, distinguished as to those cars that are per diem cars and non-per diem cars in service of the respondent at the beginning and the end of the year, and to include the definition of per diem cars given in item 7(C), below.

(2) The total per diem car days for the study year shall be separated between home per diem cars and foreign per diem cars on the basis of the percentage distribution between home and foreign of the sum of the home per diem cars on line (serviceable plus unserviceable) and the foreign per diem cars on line (serviceable plus unserviceable) using the average of the four quarters of the year as reported on Form OS-C for class I line-haul and switching and terminal companies.

(3) The total active home per diem freight train car days for the study year shall be determined by subtracting from the total home per diem freight train car days the car days in which home cars are inactive because unserviceable or because they are surplus and not needed for movement of freight.

(4) The total active foreign per diem freight car days for the study year shall be determined by subtracting from the total foreign per diem freight train car days the car days in which foreign cars are inactive because unserviceable or because they are surplus and not needed for movement of freight.

(5) The total constructive per diem payable days for the study year shall be determined by multiplying the sum of the total active home per diem freight train car days plus the total active foreign per diem freight train car days by the ratio which the total foreign per diem car days (serviceable plus unserviceable) bears to the total active foreign per diem freight train car days.

(6) Quarterly reports of Motive Power and Car Equipment, Form OS-C, filed by class I railroads, including switching and terminal railroad companies, shall be revised to provide for the reporting of serviceable and unserviceable home and foreign freight cars on line separated between per diem cars and non-per diem cars. Form OS-C shall be revised also to provide for reporting surplus per diem freight cars separated between home cars and foreign cars. The instructions to Form OS-C shall be revised to define unserviceable cars and surplus cars and per diem cars as follows:

(A) Unserviceable cars.

Unserviceable cars include cars out of service in connection with repair work. It includes cars being repaired in the shops of car builders, private car lines, and other noncarriers. (For the reporting railroads, it does not include cars which are being repaired in the shops of other railroads). It includes cars on repair tracks repaired and awaiting switching, cars on repair tracks undergoing or awaiting repairs, cars awaiting movement to repair tracks held on bad order storage tracks, cars awaiting movement to repair tracks held in train yard (excluding cars which are to be repaired in train yard without loss of time), cars moving empty in trains en route to shops, cars stored awaiting disposition (not including cars which have been retired from service and written out of ownership).

(B) Surplus per diem cars.

Surplus per diem cars are per diem cars which are in serviceable condition available for loading at the initial count on the last day of the quarter, but which have not been placed for loading within 48 hours. A record shall be made of all such cars on hand at 12:01 a.m. of the day following the last day of each quarter and a count of the same cars made 48 hours later to ascertain those still not placed for loading. The count of surplus cars shall include cars assembled in advance to meet loading requirements of more than 1 day, cars which have not been moved because of infrequent train service as on branch lines, cars set aside or stored for special or future loading such as perishables, grain, autos, rough freight, et cetera, cars stored because of seasonal decline in traffic, as coal cars, ore cars, et cetera. The count of surplus cars shall not include cars out of service in connection with repairs, cars actually moving en route to owners, cars moving on car service order cars in transit to loading points on holding road or to another road. The phrase "placed for loading" refers to: (1) physical switching of a car into position for loading (2) physical switching of a car into possession of a shipper who will subsequently move it to loading position; and (3) physical switching onto tracks at a freighthouse, pier, et cetera, for the purpose of being loaded.

(C) Per diem cars.

As used herein refers to freight cars other than cabooses owned or held under lease arrangement by U. S. class I line-haul railroads, whose interline rental is settled on a per diem basis under the code of per diem rules, or would be so settled if used by another railroad.

(7) Using ratios computed from information reported by class I line-haul and switching and terminal companies in Form OS-C, the average for the four quarters of the study year, the unserviceable per diem car days for the study year and surplus per diem car days for the study year shall be developed as follows:

(A) Unserviceable car days.

The ratio of home unserviceable cars on line to total home cars on line (serviceable plus unserviceable) shall be applied to the total home per diem car days computed in accordance with item 1 above to produce the unserviceable

car days of home cars for the study year. The ratio of foreign unserviceable per diem cars on line to total foreign per diem cars on line (serviceable plus unserviceable) shall be applied to the total foreign per diem car days on line developed in accordance with item 1 above to produce the total foreign per diem unserviceable car days for the study year.

(B) Surplus car days.

The ratio of home surplus per diem cars on line to home per diem cars on line (serviceable plus unserviceable) shall be applied to the total home per diem car days developed in accordance with item 1 above to produce the surplus car days of home per diem cars for the study year. The ratio of foreign surplus per diem cars on line to total foreign per diem cars on line (serviceable plus unserviceable) shall be applied to the total foreign per diem car days developed in accordance with item 1 above to produce the surplus car days of foreign per diem cars for the study year.

(8) Schedule 531, Statistics of Rail-line Operations, railroad annual report form A, shall be revised to require separate reporting of loaded and empty freight car miles of per diem cars in freight trains and passenger trains, and to include the definition of per diem cars given in item 7(C), above. Revisions herein prescribed to various reports shall take effect January 1, 1969.

Until current data is available to calculate the car-mile divisor, it shall be determined in the manner set forth in schedule 3, sheet 1, line 3, column 3, of Rail Form H. This requires the deduction from the annual report car-miles of all cars on class I railroads for the year under consideration of the estimated car-miles of non-per diem cars. The latter figure is estimated by applying to the annual car-miles of non-per diem cars on class I line-haul railroads in 1960, the ratio of car-miles of mileage cars in the year under consideration to the car-miles of mileage cars for the year 1960.

Until current data is available from the reports mentioned above, the car-day divisor shall be determined by the procedure set forth in Rail. Form H, schedule 2. The active per diem car days for the year under consideration developed at line 11, part B, thereof, shall be multiplied by the 1960 ratio of per diem days paid for to active foreign per diem car days and the product divided by the average number of per diem freight train cars in service in the year under consideration, developed at line 5, part A.

TABLE A

Statistical and repair summary

Line No.	Item (1)	Source (2)	Total (3)	Mileage portion 50 percent of column (3) (4)	Time portion 50 percent of column (3) (5)
1	Freight-train car repairs[1]	Rail Form H, schedule 1, sheet 4, line 65, column (5)--	------	----------	----------
2	Depreciation of freight-train car repair facilities	Rail Form H, schedule 1, sheet 3, line 57, column (5)--	------	----------	----------
3	Property taxes on car repair facilities	Rail Form H, schedule 1, sheet 3, line 52, column (5)--	------	----------	----------
4	Payroll taxes	Rail Form H, schedule 1, sheet 3, line 50, column (5)--	------	----------	----------
5	Return on investment in freight-train car repair facilities	Rail Form H, schedule 1, sheet 4, line 62, column (5)--	------	----------	----------
6	Return on working capital	Rail Form H, schedule 1, sheet 4, line 63, column (5)--	------	----------	----------
7	Total ownership repair cost to be apportioned between miles and time	Lines 1 to 6 inclusive	------	----------	----------

Line No.	Item (1)	Source (2)	Total (3)	Home cars (4)	Foreign cars (5)
8	Total per diem freight-train cars in service, owned and leased from others December 31, 19__ (year preceding study year)	19__ Annual Report Form A, schedule 417	------	xxx	xxx
9	Total per diem freight-train cars in service, owned and leased from others December 31, 19__ (study year)	19__ Annual Report Form A, schedule 417	------	xxx	xxx
10	Average number of per diem freight-train cars in service, owned and leased from others (study year 19__)	Line 8 plus line 9 divided by 2.0	------	xxx	xxx
11	Total per diem car days, study year 19__	Line 10 x 365[2]	------	xxx	xxx
12	Serviceable per diem cars on line end of the quarters study year 19__	Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__	------	----------	----------
13	Unserviceable per diem cars on line end of the quarters study year 19__	Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__	------	----------	----------
14	Surplus per diem cars on line end of the quarters study year 19__	Form OS-C, class I line-haul and switching and terminal companies, average of the four quarters, study year 19__	------	----------	----------
15	Total per diem cars on line end of the quarters study year 19__	Line 12 plus line 13	------	----------	----------

See footnotes at end of table

Statistical and repair summary—Continued

Line No.	Item (1)	Source (2)	Total (3)	Home cars (4)	Foreign cars (5)
16	Percentage distribution of per diem cars on line between home and foreign	Line 15	100.000%	%	%
17	Ratio of unserviceable per diem cars on line to total per diem cars on line	Line 13 divided by line 15	xxx		
18	Ratio of surplus per diem on line to total per diem cars on line	Line 14 divided by line 15	xxx		
19	Total per diem car days study year 19__ separated between home and foreign	Line 11, column (3) x line 16			
20	Unserviceable per diem car days study year 19__	Line 17, x line 19		*	
21	Surplus per diem car days study year 19__	Line 18 x line 19		*	
22	Active per diem car days study year 19__	Line 19 minus lines 20 and 21			
23	Ratio total foreign per diem car days to total active foreign per diem car days	Line 19, column (5) divided by line 22, column (5)	xxx	xxx	
24	Total constructive per diem payable days study year 19__	Line 22, column (3) x line 23, column (5)		xxx	xxx
25	Total line-haul car-miles of per diem cars in the United States (loaded plus empty)	Annual report schedule 531		xxx	xxx
26	Constructive per diem payable days per car	Line 24, column (3) divided by line 10, column (3)		xxx	xxx
27	Line-haul car-miles per car	Line 25, column (3) divided by line 10, column (3)		xxx	xxx
28	Average repair cost per car	Line 7, column (4)(5) divided by line 10, column (3)		[3]	[3]

[1]Including allocation of inspection costs, nonrevenue freight, overheads, maintenance of shops, power plants, work equipment, miscellaneous equipment, and switching bad order cars.

[2]In leap years use 366.

*Cross add for total.

[3]Mileage and time portions of repair cost—50 percent each.

The rates hereinafter prescribed are based upon rail Form H calculations for the years 1963, 1964, and 1965, and the principles mentioned herein. Pending the availability of car-day and car-mile divisors developed currently as described above, these figures must be developed by use of Rail Form H and the ratios developed in the 1960 special studies. Shown below is a summary of the pertinent data.

TABLE A

Composite of statistical and repair summary

Item	1963	1964	1965
Freight train car repairs	$550,322,495	$564,752,370	$562,290,338
Depreciation facilities	8,071,570	8,088,396	8,143,383
Property taxes–facilities	3,385,171	3,257,518	3,323,316
Payroll taxes	27,145,511	28,162,325	29,179,129
Return on investment–repair facilities	11,645,943	10,557,090	10,750,805
Return on working capital	2,665,587	2,730,841	2,946,229
Total	603,236,276	617,568,540	616,632,900
Mileage portion	301,618,138	308,784,270	308,316,450
Time portion	301,618,138	308,784,270	308,316,450
Average number cars in service	1,494,348	1,460,000	1,438,345
Active per diem car days	475,265,360	431,613,831	477,952,280
Per diem payable days	505,031,229	458,645,505	507,886,431
Total line-haul car-miles	24,290,196,857	22,217,341,219	22,981,573,444
Per diem payable days per car	337	346	.352
Line haul car-miles per car	14,249	15,218	15,979
Average repair cost per car (50 percent)	201.83	211.49	213.66

	Per diem payable days per car	Line-haul car miles per car	50-percent average repair cost per car
3-year average	345	15,149	$209.00
Property tax ratio-1965	0.01018		

TABLE B

Summary of investment costs—per $1,000 original cost

Years in service	Annual charge to depreciation per $1,000 cost[1]	Composite interest on balance[2]	Reimbursement of property taxes[3]	Total columns 2, 3, 4
Group A 0–5	$30.00	$55.50	$9.42	$94.92
Group B 6–10	30.00	46.50	7.90	84.40
Group C 11–15	30.00	37.50	6.38	73.88
Group D 16–20	30.00	28.50	4.87	63.37
Group E 21–25	30.00	19.50	3.35	52.85
Group F 26–30	30.00	10.50	1.85	42.35
Group G over 30	xxx	6.00	1.02	7.02

[1]At 3 percent per annum.

[2]At 6.0 percent per annum before taxes on midyear value of middle year of period based on original cost reduced 3 percent per annum.

[3]Taken at 1965 figure of 0.01018 multiplied by midyear value of car for middle year of period based on original cost reduced 3 percent per annum.

We find that the rates set forth in table C, below, are based on conservative estimates of cost, are just and reasonable and will provide just and reasonable compensation to car owners for the future, and that such rates shall be assessed and paid by all respondent carriers subject to the act from and after the effective date of our order herein.

RATE TABLE C

Cost Bracket (1)	Mileage charges: Annual reduction in car value[1] (2)	Mileage charges: Annual repair and maintenance[2] (3)	Mileage charges: Total mileage cost[3] (4)	Mileage charges: Charge per line-haul mile[4] (5)	Time charges: Group A 0—5 years: Annual[5] (6)	Time charges: Group A 0—5 years: Daily[6] (7)	Time charges: Group B 6—10 years: Annual[5] (8)	Time charges: Group B 6—10 years: Daily[6] (9)
$0-1,000	$12	$209.00	$221.00	1.47¢	291.92	$0.85	281.40	0.82
1-3,000	24	209.00	236.00	1.57¢	374.84	1.09	353.80	1.03
3-5,000	48	209.00	257.00	1.71¢	540.68	1.57	498.60	1.45
5-7,000	72	209.00	281.00	1.87¢	706.52	2.05	643.40	1.86
7-9,000	96	209.00	305.00	2.03¢	872.36	2.53	788.20	2.28
9-11,000	120	209.00	329.00	2.19¢	1,038.20	3.01	933.00	2.70
11-13,000	144	209.00	353.00	2.35¢	1,204.04	3.49	1,077.80	3.12
13-15,000	168	209.00	377.00	2.51¢	1,369.88	3.97	1,222.60	3.54
15-17,000	192	209.00	401.00	2.67¢	1,535.72	4.45	1,367.40	3.96
17-19,000	216	209.00	425.00	2.83¢	1,701.56	4.93	1,512.20	4.38
19-21,000	240	209.00	449.00	2.99¢	1,867.40	5.41	1,657.00	4.80
21-23,000	264	209.00	473.00	3.15¢	2,033.24	5.89	1,801.80	5.22
23-25,000	288	209.00	497.00	3.31¢	2,199.04	6.37	1,946.60	5.64
25-27,000	312	209.00	521.00	3.47¢	2,364.92	6.85	2,091.40	6.06
27-29,000	336	209.00	545.00	3.63¢	2,530.76	7.34	2,236.20	6.48
29-31,000	360	209.00	569.00	3.80¢	2,696.60	7.82	2,381.00	6.90
31-33,000	384	209.00	593.00	3.95¢	2,862.44	8.30	2,525.80	7.32
33-35,000	408	209.00	617.00	4.11¢	3,028.28	8.78	2,670.60	7.74
35-37,000	432	209.00	641.00	4.27¢	3,194.12	9.26	2,815.40	8.16
37-39,000	456	209.00	665.00	4.43¢	3,359.96	9.74	2,960.20	8.58
39-41,000	480	209.00	689.00	4.60¢	3,525.80	10.22	3,105.00	9.00

ee footnotes at end of table

Time charges—*Continued*

Line No.	Cost bracket	Group C 11-15 years		Group D 16—20 years		Group E 21—25 years		Group F 26—30 years		Group G over 30 years	
		Annual[5]	Daily[6]	Annual[5]	Daily[6]	Annual[5]	Daily[6]	Annual[5]	Daily[6]	Annual[5]	Daily[6]
		(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)
1	$0-1,000	270.88	0.79	260.37	0.75	249.85	0.72	239.35	0.69	216.02	0.63
2	1-3,000	332.76	0.96	311.74	0.90	290.70	0.84	269.70	0.78	223.04	0.65
3	3-5,000	456.52	1.32	414.48	1.20	372.40	1.08	330.40	0.96	237.08	0.69
4	5-7,000	580.28	1.68	517.22	1.50	454.10	1.32	391.10	1.13	251.12	0.73
5	7-9,000	704.04	2.04	619.96	1.80	535.80	1.55	451.80	1.31	265.16	0.77
6	9-11,000	827.80	2.40	722.70	2.09	617.50	1.79	512.50	1.49	279.20	0.81
7	11-13,000	951.56	2.76	825.44	2.39	699.20	2.03	573.20	1.66	293.24	0.85
8	13-15,000	1,075.32	3.12	928.18	2.69	780.90	2.26	633.90	1.84	307.28	0.89
9	15-17,000	1,199.08	3.48	1,030.92	2.99	862.60	2.50	694.60	2.01	321.32	0.93
10	17-19,000	1,322.84	3.83	1,133.66	3.29	944.30	2.74	755.30	2.19	335.36	0.97
11	19-21,000	1,446.60	4.19	1,236.40	3.58	1,026.00	2.97	816.00	2.37	349.40	1.01
12	21-23,000	1,570.36	4.55	1,339.14	3.88	1,107.70	3.21	876.70	2.54	363.44	1.05
13	23-25,000	1,694.12	4.91	1,441.88	4.18	1,189.40	3.45	937.40	2.72	377.48	1.09
14	25-27,000	1,817.88	5.27	1,544.62	4.48	1,271.10	3.68	998.10	2.89	391.52	1.13
15	27-29,000	1,941.64	5.63	1,647.36	4.77	1,352.80	3.92	1,058.80	3.07	405.56	1.17
16	29-31,000	2,065.40	5.99	1,750.10	5.07	1,434.50	4.16	1,119.50	3.24	419.60	1.22
17	31-33,000	2,189.16	6.35	1,852.84	5.37	1,516.20	4.39	1,180.20	3.42	433.64	1.26
18	33-35,000	2,312.92	6.70	1,955.58	5.67	1,597.90	4.63	1,240.90	3.60	447.68	1.30
19	35-37,000	2,436.68	7.06	2,058.32	5.97	1,679.60	4.87	1,301.60	3.77	461.72	1.34
20	37-39,000	2,560.44	7.42	2,161.06	6.26	1,761.30	5.11	1,362.30	3.95	475.76	1.38
21	39-41,000	2,684.20	7.78	2,263.80	6.56	1,843.00	5.34	1,423.00	4.12	489.80	1.42

[1]Forty percent of annual reduction in value (depreciation).

[2]Statistical summary—line 28, column 4.—3-year average—see table A.

[3]Column 2 + column 3.

[4]Column 4 divided by car-mile divisor—statistical summary, line 27, column 3.—3-year average (15,000) see table A.

[5]Tax and investment costs for group and cost bracket (table B, column 5) less column 2 plus time portion of 3-year average repair and maintenance cost (statistical summary, line 28, column 5)—see table A.

[6]Annual time cost divided by car day divisor (statistical summary, line 26, column 3)—3-year average (345d) see table A.

DOCKET NO. 31358

In docket No. 31358, the complainants seek a finding by the Commission that the AAR per diem rates charged since March 1951 were just, reasonable, and otherwise lawful, and that payments at lesser rates have been, are, and would be unjust, unreasonable, and noncompensatory, in violation of section 1 of the Interstate Commerce Act. As a result of subsequent amendments to the complaint in this case, it now embraces all past rates, including the multilevel rates. The circumstances involved in this dispute were fully described in the prior report of the Commission. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co., supra.* In that report, decided October 17, 1955, it was found that the rates charged up to that time were not in excess of reasonable compensation during the periods in which they were effective, and that the then existing rate of $2.40 was not in excess of reasonable compensation for present use. Upon appeal by the defendants, a three-judge United States District Court set aside the order of the Commission discontinuing the proceeding and remanded it for further consideration. *Boston & Maine Railroad* v. *United States, supra.* An appeal to the United States Supreme Court was dismissed. *Boston & Maine Railroad* v. *United States, supra.*

As heretofore described, a number of the complainants commenced civil actions before the United States District Court for the Southern District of New York, seeking judgments for damages against the defendants for the balance of per diem payments alleged to be due and unpaid. The court in those cases found generally for the complainants, but deferred decision as to the amount of damages pending the final determination of the issues in docket No. 31358. Pursuant to the order of the court, certain of the parties to the civil suits sought and obtained permission to intervene in docket No. 31358, and appropriate amendments to the complaint in that proceeding were made, requesting the Commission, without regard to the proceeding pending in docket No. 33145, to advise the court what per diem rate was just, fair, reasonable and nondiscriminatory for each month beginning with August 1953, to the date of the order of the court, i.e., June 15, 1962. A certified copy of the order was required to be filed with the Commission, which specifically requested its cooperation and advice as described above. *Baltimore & O. R. Co.* v. *New York, N. H. & H. R. Co., supra.* Similar advices are desired by the Supreme Court of the

State of New York, County of New York, in connection with the disposition of suits brought by the Boston & Maine and New Haven Railroad against the Illinois Central Railroad to recover interline freight balances, in which the defendant counterclaimed for balances under per diem claims.

In giving further consideration to the issues in docket No. 31358, certain questions raised on remand require attention. In 1951, the AAR subcommittee on mileage and per diem recommended that account No. 314, the major repair account, be subdivided to record separately the repair costs for home cars, foreign cars, railroad and privately owned mileage cars, and cabooses; that classified repairs, running repairs, switching expenses and credits for sales of scrap be shown separately; and that car repairs for cabooses be eliminated from account No. 314 and caboose-car days eliminated from the freight-car day divisor. In remanding the case, the court expressed the view that the Commission should not have rejected the recommendation without a more thorough investigation and analysis.

Concededly, the multitudinous cost items entered in account No. 314 over the years, without separation as to the sundry elements mentioned by the committee, are not now susceptible of separation. Sample studies conducted by the Section of Cost Finding in 1960 dealt with several separations, however, and the analysis based thereon took into consideration such of these factors as were considered significant. The recorded totals of the past accounts can be separated, therefore, by use of the ratios derived from the 1960 studies. The findings which follow include this procedure.

The court also expressed doubt as to the validity of car-day divisors which were based upon average utilizations for the past 20 years, the period having been chosen with reference to the average age of cars then in service. There can be little dispute that where the object of the computation is to ascertain the cost per active car day for any given period, not only must the costs incurred in that period be employed, but also the active car days for that same period. Since our consideration in docket No. 31358 is of past years, we have no need to attempt an approximation of utilization to be anticipated in the future and may employ, to the extent permitted by available statistics, the car days for the years in issue.

Remand of docket No. 31358 by the United States District Court was due to the conclusion of the court that consideration should have been given to car mileage and the fair distribution of per diem

costs among car users. We have found that the substantial difference in use of cars measured by line-haul mileage requires that it be reflected in the distribution of per diem costs in the future. No records are available, however, with which to determine the actual mileages of foreign per diem cars during the past periods when the challenged rates were in effect.

A method of estimating an appropriate rate for past years which took into account a charge based on mileage was suggested by the Section of Cost Finding and a generally similar method was used by the examiner to calculate rates which he found reasonable for past years. Both methods require certain assumptions which are not sufficiently supported by the record. After assigning the total annual costs for the year 1960 between time and mileage, each estimates the per-mile and per-day cost. For each carrier the per-mile cost is multiplied by its 1960 line-haul mileage of foreign cars and divided by its per diem days paid for to produce a daily figure which, when added to an individually adjusted per-day cost, constitutes the rate estimated as proper to be paid by that carrier. Necessarily, a different rate is produced for each carrier.

To estimate a similar rate for each carrier for years other than 1960, the examiner determined the ratio which the 1960 rate bore to the 1960 average rate calculated on a time-only basis, and applied this to the average, time-only rates which he found to be reasonable for each of the past periods during which the AAR rates were in effect. The Section of Cost Finding method employed the ratio which the individual carriers' time-mile rate in 1960 bore to the overall time-mile rate of all carriers in that year, applying it to a separately estimated overall time-mile rate for the year under consideration. There is some evidence that the ratio of per diem days paid for by individual railroads in 1960 to the total of all carriers is substantially similar to the ratio in other years in issue, but a similar relationship has not been proven with respect to the mileage of foreign cars on individual lines. While many of the ratios developed in the 1960 studies, particularly those in schedule I of Rail Form H underlying the estimation of ownership repair costs, would not change appreciably from year to year, this is not true with respect to the ratios necessarily employed in estimating these time-mileage rates for individual carriers. It cannot be found that 1960 was so nearly representative of conditions prevailing throughout all the other years in issue with respect to car mileage on a carrier-by-

carrier basis as to justify reliance on these ratios in making determinations upon which monetary judgments depend.

We find that no practicable and probative method has been demonstrated on this record by which a reliable estimate might be made as to the distribution of costs between time and mileage for individual defendants in past years, or for all railroads for years other than 1960. The reasonableness of rates assessed in past years must be measured by their application on a daily basis.

As a result of the complaint filed on September 21, 1953, the decision by the commission in the title proceeding on October 19, 1955, and our decision in *Alabama T. & N. R. Co. v. Aberdeen & R. R. Co.*, *supra*, the use of reproduction cost as the base for calculation of charges to depreciation and interest was approved. In neither of those cases did the record contain the extensive special studies and data now available for our consideration. In 1949 and in 1955, the daily rate based upon the average depreciation and interest cost of all cars was clearly insufficient to cover the particular costs of many of the new cars then being built. The greater desirability of the new cars apparently resulted in greater use being made of them by foreign lines, either pursuant to or in violation of car service rules. As to these particular cars, owners did not receive just and reasonable compensation under rates fixed by the average costs of all cars. At the same time, to the extent that the older cars were used, the amounts received by owners exceeded the necessary compensation.

Calculation of rates using reproduction cost as a base represented an attempt to compensate for this situation. The extent to which the respondents actually suffered a net deficiency in compensation as a result of undercompensation on new cars not by overcompensation on old cars has not been established.[26] Where a single average daily rate is employed, it cannot be judged with reference to the cost of particular cars. It must be measured with reference to the total costs of all cars. The increase in the per diem rates due to use of reproduction cost resulted in only a few of the new cars receiving per diem payments which met their particular costs. Thus, of the 974,386 cars sampled in 1961, there were 643,123, or about two-thirds, which had depreciated original cost of less than $3,000; 331,263

[26] On December 31, 1961, a compilation of 974,386 car items out of a total of about 1,000,000 cars indicated that about two-thirds had depreciated original costs lower than the fleet average actual book original cost, a comparison at the average rate.

had depreciated original costs over $3,000. With rates based upon original cost, about one-third of the per diem fleet would consist of cars which would not receive payments equivalent to their costs. Two-thirds would receive payments in excess of their costs. Use of reproduction cost increased the average depreciated cost to $4,200 which still left over 20 percent of the fleet undercompensated. At the same time, the latter method increased the depreciation and interest charged to the fleet as a whole by approximately $330,500,000, equivalent to over 60 cents per day on each car.

Consideration has already been given to the use of reproduction cost as a base for calculation of per diem rates and to the extent to which fairness to owners requires recognition of decreases in the purchasing power of the dollar. As heretofore pointed out, the use of a charge to depreciation based upon reproduction cost of the car provides a measure of the owner's capital cost burden only if it has paid the full purchase price itself. In fact, a substantial portion of the cost of cars is customarily obtained from lenders, and repaid over subsequent years in dollars of current purchasing power. It is proper to allow for inflation with respect to that portion of the average original cost of the cars representing the actual investment of the owner. For reasons heretofore mentioned, it is found that such allowance applied to 40 percent of the annual depreciation charge on the average original cost makes adequate provision for compensation to owners for this element of the ownership burden. No persuasive reason is shown why the invested amount upon which interest is calculated should be inflated by a cost index representing the approximate current cost of building the car. Comments with respect to this point made earlier in this report are equally applicable to the calculation for rates in prior years.

Upon further consideration we find that the use of average reproduction cost of all cars has not been shown to be just and reasonable or predictive of just and reasonable compensation to car owners. We are persuaded, however, that under a single average rate, car owners do incur some loss of just compensation due to greater than average use being made of newer cars, and in the rates hereinafter found to be just and reasonable we have included provision therefor.

None of the AAR calculations is based upon data for the years in which the rate actually was applied. Thus the $2.40 rate which was in effect from August 1, 1953 to January 1, 1957, was

based upon statistics for the calendar year 1952. These indicated a cost for repairs and associated maintenance items of 121.05 cents per active car day; taxes of 14.334 cents; return on depreciated investment in freight cars and repair facilities, based on an average of original and reproduction costs, of 47.128 cents; and allowance for depreciation, based upon reproduction cost, of 56.222 cents. The allowances for depreciation and interest on cars and facilities increased these figures approximately $200 million over original cost figures. About 1 1/3 cents per day were added to allow for 1953 increased wage and material costs.

The $2.75 rate, which was in effect from January 1, 1957, to December 1, 1959, was supported by AAR staff calculations using cost statistics for the 12 months ending June 30, 1956. These indicated a cost for repairs and associated maintenance items of 114.28 cents per active car day; taxes of 18.137 cents; return on depreciated investment in freight cars and repair facilities, based upon reproduction costs, of 72.06 cents; allowance for depreciation of freight cars, based upon reproduction costs, of 61.48 cents; and allowance for depreciation of repair facilities, based on original cost, of 1.58 cents. The mid-1955 to mid-1956 cost as thus computed, 267.54 cents per active car day, was increased by 9.41 cents to allow for labor, material and tax increases, resulting in a total of 276.96 cents, which was rounded to the $2.75 rate.

The reproduction value of cars used by the AAR to calculate the allowance for depreciation was based on reproduction costs as of December 31, 1955, using, however, the higher inventory of cars as of December 31, 1954, since that was the latest then available. The amount was also increased by 8.5 percent to reflect estimated cost increases between 1955 and the date of the AAR calculations. Cars owned or leased, including cabooses, at the end of 1954 were 1,757,731, compared to 1,719,951 at the end of 1955. The cost index increased from 450 in 1954 to 468 in 1955. Use of the higher costs as well as the higher number of cars produced an overstatement of the allowance for depreciation.

The $2.88 rate, which was in effect from December 1, 1959, to January 1, 1964, was supported by AAR staff calculations using cost statistics, other than for repairs, for the calendar year 1958. A 5-year adjusted average cost of repairs was employed, which, together with associated maintenance items, amounted to 105.35 cents per active car day. Allowance for taxes was 18.076 cents; return on depreciated investment in

freight cars and repair facilities, based on reproduction costs, was 85.737 cents; allowance for depreciation of freight cars based on reproduction cost was 73.276 cents; and allowance for depreciation of repair facilities, based on original cost, was 1.451 cents. The total cost, as thus computed, 283.893 cents per active car day was adjusted to reflect 1959 cost increases, resulting in a figure of 287.94 cents which was rounded to the $2.88 rate.

The rates for the several brackets under the new multilevel system which became effective January 1, 1964, are supported by an AAR study using 1961 costs which separated the ownership burden into two charges, one for depreciation and interest on car value, and one covering total operating costs including taxes. After classifying cars into value brackets according to their depreciated original cost, the amount to be allowed cars in each bracket for depreciation was calculated by allowing 3 percent on the average undepreciated reproduction value of that group of cars. The amount allowed as interest was calculated by taking 6 percent of the average depreciated reproduction value of all cars in the group. All other costs were taken as the same for every car, and were calculated at $406 per car. In calculating the cost of taxes, and the repair and associated maintenance costs, which produced the figure of $406, the AAR employed the same procedures used in computing these items in prior years. Ratios and apportionments used were those developed by the 1956 questionnaire, heretofore mentioned. Account No. 314 repair costs to be anticipated were estimated by using the average of such costs for the 5-year period, 1957-1961, and a car utilization factor of 91.87, or 335.33 days, was assumed, based upon the average of the 20-year period, 1942 through 1961.

Both the Section of Cost Finding calculations and those made by the AAR in support of the rates prior to 1964 purport to calculate the ownership cost of freight cars at an average figure spread over all per diem cars for days of active use. Substantial variations occur, however, due to differences in the apportionments, methods used, and the basic data employed. To calculate the base for depreciation, the AAR multiplied the number of cars in per diem use, both owned and leased, by the average undepreciated reproduction cost, the latter figure having been obtained from the Commission's Bureau of Accounts, Section of Valuation and Depreciation. A rate of slightly over 3 percent was then applied to the total valuation to calculate the charge. The Section

of Cost Finding calculations employ the Annual Report data fo charges to depreciation plus an allowance for assumed depreciatio on fully depreciated cars. These are based upon original costs In place of using a depreciation charge for cars leased fro nonrailroad owners, the Section of Cost Finding method include the payments made to such owners as shown in the annual reports with minor adjustments. Where a single average rate is bein calculated for all cars, the method used by the Section of Co Finding appears the more accurate.

Prior to the calculations underlying the $2.88 rate, account No 314 repair costs had been estimated by the AAR using the costs o the latest available year. Beginning with that rate, and again i calculations underlying the multilevel rates, the average o account No. 314 costs for the last 5 years, adjusted to curre levels, was employed. The record demonstrates that account No 314 is subject to annual fluctuation of as much as 20 percent. Th 1954-58 adjusted account No. 314 average as computed by the AA and employed in calculations underlying the $2.88 rate whic became effective December 1, 1959, was $590,045,295. Th actual amount subsequently developed by the AAR for 1959 wa $516,023,831, and for 1960, the first full year in which the rat applied, the actual amount was $488,898,352. In 1961 the figur dropped to $438,620,793.

The AAR estimated the deadhead haul cost of repair materia referred to by the Section of Cost Finding as nonrevenue freight by taking 6.06 percent of the total of the material proportion of th freight car repair proportion of general expense, maintenance o shop and equipment accounts, and the material portion assigne from account No. 314. The percentage was based upon a stud made in connection with *Rules for Car-Hire Settlement*, supra while apportionment of the various accounts was based on studie made in 1956.[27] The Section of Cost Finding analyzed the 196 Annual Report accounts to isolate expenses applicable to non revenue freight. From the special studies, ratios were develope to estimate the ton-miles of nonrevenue freight applicable to equip ment repairs, and the consequent cost. Further analysis of repai accounts in the Annual Reports developed the separation of thi amount between ownership costs of per diem cars, and othe costs.

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[27] The case cited was decided January 1, 1930 and the study was between 2 and 30 years old during the period it was used by the AAR for the calculatio of rates here in issue.

Adjustments used by the AAR to account No. 314 were based upon the returns to a questionnaire of August 14, 1956, covering operations for the 12 months ending June 30, 1956. One of these adjustments involved a reduction of from 64 to 66 percent of the total labor cost of train yard and interchange inspection, to eliminate costs resulting from inspection of private cars, foreign per diem cars, and that related to transportation activities. A further deduction of 1.46 percent of the total of account No. 314 was made to reflect payments for foreign cars destroyed, less salvage. Labor and material charges for user responsibility repairs to foreign cars were deducted by use of an amount calculated at 2.73 percent of the total account No. 314.

The Section of Cost Finding analysis included as ownership costs the inspection costs of foreign cars, and deducted the cost of repairs to home cars which were user responsibility. In the calculations underlying the $2.40 rate the AAR employed 40 percent of inspection costs as the portion applicable to private cars, user costs and transportation activities. This was based upon the results of the 1947 studies. The Section of Cost Finding studies in 1960 indicated that 45 percent should be so assigned.

Deductions made by the AAR from account No. 314 included 2.73 percent of the total, based upon the 1956 studies, representing the labor and material charges and voucher payments for repairs to foreign cars made necessary by unfair usage by the handling line. This deduction does not include any amount for handling line responsibility repairs by car owners, made on their own cars when acting as user thereof. Thus, while the per diem rate eliminated the cost of repairs due to unfair usage by users of foreign cars, it did not eliminate the cost of repairs due to unfair usage by the owner when using its own car. The cost of unfair usage repairs should be borne by the using line directly, whether the car is home or foreign. The 1960 studies indicated that 2.788 percent of account No. 314 total repair costs arose from this source.

While the Section of Cost Finding analysis covers about 21.2 percent less cars than those included by the AAR, generally the total amounts for repairs and associated items are higher. A major cause of the difference is in the allowance for switching of bad order cars. The AAR added to account No. 314 an amount equal to 1.24 percent thereof, based upon its 1956 study, to approximate the additional charges for this item which were recorded in other accounts. The Section of Cost Finding analysis for 1960

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added the equivalent of 14.7 percent of account No. 314 for this item. The remainder of the excess of these calculations arises from larger allowances for items of general expenses, transportation expenses, maintenance of way expenses, and overheads on the latter two. The content and method of evaluation of the questionnaires relied upon by the AAR are not of record. In view of the continuing changes in composition of the per diem fleet, traffic movement and volume, operating practices, et cetera, it must be found that the results produced by the 1960 studies are the most reliable and take precedence over inconsistent estimates developed through use of the older studies.

To develop car-day divisors, the AAR totaled the freight cars owned or leased at the end of each year for the preceding 20 years, and subtracted therefrom the total average number of home bad order and surplus cars for the same years. The ratio of the resulting figure to the total number of cars was then multiplied by 365 to determine the active car days per car. The figures included cabooses and other cars not used in per diem service but, to an indeterminate extent, any inaccuracy resulting therefrom was offset by the inclusion of the costs attributable to the additional cars.

The deduction as computed by the AAR for home cars out of service due to repairs exceeds that indicated by the special studies. Members of the AAR report on form CS-60 the home per diem cars out of service for this cause. A test in September 1956, indicated that these reports were understated by 23.4 percent. In subsequent per diem cost calculations the reported totals were increased by this percentage. For the year 1960, the reported number of 132,597, thus increased, and multiplied by 366 days, produces 59,886,640 bad order car days. The special studies indicated 54,198,734, a difference of about 10 percent.

The deduction for surplus cars used by the AAR appears greatly underestimated. Members of the AAR regularly report to that organization, on form CS-44, the number of surplus cars on hand, both home and foreign. A 1-week test in February 1949, indicated that approximately 1.6 percent were foreign cars and thereafter the amount to be deducted for surplus cars was reduced by this percentage. As reported, the daily average figure for home and foreign surplus cars for 1960 was 36,672. Reduced by the factor above mentioned to eliminate foreign cars, and multiplied by 366 days, produces a figure of 13,421,952 surplus car days, less than 20 percent of the number indicated by the Section of Cost Finding studies.

The Section of Cost Finding studies were based upon actual counts of cars on hand and not placed for loading at the beginning and end of a 48-hour period. The reports on CS-44 are based upon the judgment of each carrier's personnel. The latter require that each carrier estimate, at the end of each day, the empty cars on hand at loading stations in excess of the number needed for the next day's loading. It is a figure which the AAR witness conceded was not very accurate, and was generally understated, particularly in periods of car shortage.

The validity of the AAR cost calculations, and the questionnaire data employed, were challenged on a number of grounds. In his report the examiner made a number of revisions of the AAR calculations to conform to the principles which he found applicable. On exceptions, the revisions to the AAR calculations are challenged in several respects while other parties criticize the absence of revisions which they espouse. Upon consideration of the entire record, we conclude that the past AAR calculations are based upon statistics and apportionments of such limited probative value as to render them unsatisfactory as a measure of past per diem costs. We find that the complainants in docket No. 31358 have failed to sustain their burden of proving that the rates in issue are just, reasonable, and nondiscriminatory for use in the determination of per diem charges with respect to the defendants.

The complaints, as amended, seek specific findings for each and every month, at least through June, 1962. The record does not contain, nor, so far as appears, does the data exist, in such form as to make possible separate calculations as to ownership costs on a monthly basis. Maintenance of records on an annual basis precludes any attempt to analyze the costs with relation to shorter periods, although findings obviously may be applied on a monthly basis. Summary T-1 of Rail Form H provides a method of deriving a single average daily per diem cost applicable to all cars for years other than 1960, making use of the ratios and apportionments developed through the 1960 studies.

We have found that car owners will receive a fair return on the value of their investment in freight cars under a multilevel system by allowance of interest at 9 percent before taxes on 40 percent of original cost and 4 percent before taxes on 60 percent of original cost. Under that system, the allowance for depreciation of each car is related closely to its actual annual loss in value. When a single average rate is applied to all cars, having appreciably different original costs, compensation to

individual owners, or for particular cars, may not be as complete. This is an inevitable consequence of averaging. Insofar as rates for the past are concerned, the record permits only the latter method and our findings, made pursuant to the requests of the United States District Court and the Supreme Court of the State of New York, are on this basis.

As noted above, we are satisfied that strict adherence to the interest rates just mentioned will not compensate owners for the consequences of excess use of higher cost cars when a single average rate is used, but that application of the account No. 53 index of freight car costs to the depreciation and interest base is improper. Summary T-1 of Rail Form H, however, includes an allowance for interest before taxes which results in an after tax return of 4 percent on the total original cost. The net effect is to allow car owners interest on the 40 percent investment in excess of 10 percent before taxes, while retaining a return of 3.849 percent before taxes to meet average interest costs of borrowed funds. This cost analysis also allows car owners substantial sums as depreciation charges on cars which had been fully depreciated under accelerated schedules pursuant to the defense amortization program prior to the period covered by the present dispute. We find that determination of just, reasonable, and nondiscriminatory rates for the past for the settlement of per diem balances between the plaintiffs and the defendants in docket No. 31358, can most effectively be accomplished by application of the cost analysis designated as Summary T-1 of Rail Form H, using the ratios and apportionments developed by the 1960 special studies. The summary calculations from Rail Form H, using the methods herein approved, for each year from 1953 through 1965, inclusive, are shown in the appendix to this report.

The defendants in docket No. 31358 contend that we should calculate and deduct from the per diem charges for the past years amounts which represent ownership repairs made by them and not reimbursed pursuant to AAR rules. We have heretofore expressed our view that the calculation of ownership costs and consequent per diem rates must include all costs properly attributable to the repair and maintenance of the cars. As amended, the complaint seeks specific findings as to the just and reasonable rates, which findings may be considered by the United States District Court and the New York Supreme Court in assessing damages. The per diem rate which is fair and reasonable must be measured by an equitable distribution of total ownership burden. It exists

independently of alleged offsets and must be found without reference to them.

Upon consideration of the record herein, we find that the just, fair, reasonable, and nondiscriminatory rates, proper as daily charges for the settlement of per diem balances by and between the parties to pending suits herein before described for the use of foreign per diem freight cars in and during each and every month from August 1953 through December 1965, inclusive are as shown below. The fluctuations in rates from year to year result from changes in economic activity and consequently the extent to which cars are utilized.

Year	Rate Per Day
1953	$2.12
1954	2.37
1955	1.92
1956	1.96
1957	2.12
1958	2.60
1959	2.44
1960	2.50
1961	2.58
1962	2.76
1963	2.50
1964	2.69
1965	2.85

Our conclusions with respect to the present multilevel rates bar any attempt to furnish advice as to just and reasonable rates for the past on a multilevel basis. Available information limits our findings to the single, average rates shown above. Just and reasonable rates for years subsequent to 1965 may be calculated in the same manner as heretofore set forth.

Insofar as the rates approved here for the future are concerned, the respondents will be expected to give them a fair opportunity, through practical application. Proceedings such as those here presented are primarily in the nature of contractural disputes solely between carriers where settlements should be encouraged. After giving such rates a fair opportunity, the respondents will be expected to attempt first to reconcile any differences and reach

some agreement before calling upon the Commission to mod
the rates prescribed, particularly since the underlying facts a
within the carriers' own knowledge and control.

There is a clear distinction between the provisions of secti
1(14)(a) herein applied and the recently confirmed statute
authority embodied in the new provisions enacted by the Congres
The former provisions, as interpreted by the courts, limit o
powers to determining compensation (basic per diem) bas
strictly upon cost considerations. On the other hand, the latt
provisions that empower us to set so-called incentive rate
which are obviously something above and beyond the regular
basic compensation, permit us to consider and give effect
factors other than costs, such as the need for encouraging t
construction of new cars and for the general replenishing of t
car fleet. While the incentive provisions are not involved in t
instant proceedings and cannot be considered on this record,
other proceedings currently pending at various stages of admi
istrative process, the Commission is moving toward determina
tion of whether or not incentive rates should be established a
the attendant question of modification of our present car servic
rules.

Summary of Findings and Conclusions

To recapitulate our findings and conclusions with respect t
the principal matters in issue, upon consideration of the entir
record herein, we find:

1. That in docket No. 31358 the per diem rates charged pursuan
to the agreement, *Section 19, Application No. 7, Modified
American Railroads, Per Diem, Mileage, Demurrage and Storage
Interchange*, approved August 28, 1950, from and after August 1
1953, have not been shown to be just, fair, reasonable and non
discriminatory;

2. That in docket No. 31358, the just, fair, reasonable, an
nondiscriminatory rates, prices, or daily charges for the settle
ment of per diem balances by and between the parties to pendin
suits hereinbefore described for the use of foreign per diem
freight cars in and during each and every month from August
1953 through December, 1965, are those set forth above, an
that the just, fair, reasonable, and nondiscriminatory rates fo
these purposes for the period subsequent to January 1, 1966
until the effective date of the rates herein prescribed shall be
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ascertained by the methods employed herein to calculate the rates found reasonably for the prior years;

3. That the performance of orderly and efficient transportation service by rail in the future requires the uniform observance of per diem charges by all railroads and the prescription of such uniform charges by this Commission pursuant to the authority contained in section 1(14)(a) of the Interstate Commerce Act;

4. That reasonable compensation to owners of freight cars in per diem service requires an appropriate allowance for the impact of inflation upon the funds invested in them, and that allowance of 40 percent of the original cost of freight cars as that portion fairly representative of the average owner's investment, and the allowance of a return of 9 percent interest before income tax upon such amount provides reasonable compensation therefor and includes a fair return upon the value of their investment;

5. That reasonable compensation to owners of freight cars in per diem service requires the calculation of ownership costs as provided hereinbefore, including prescription of a method of allocating and computing costs of repair and maintenance, taxes, and capital investment;

6. That reasonable compensation to car owners requires that the ownership costs be distributed among and borne equitably by all railroads making use of such cars in and proportion to the amount of use, that the use made of cars must be measured by both the length of time cars are held and the amount of activity for which they are subjected, and that the most practicable and reliable method of measuring car activity is the time-load mileage over which they are moved;

7. That the cost of repair and maintenance of freight cars should be distributed between time and mileage, one-half to each, and that the retirement value of cars resulting from their employment in transportation service should be spread over a period of 30 years, allowing 5 percent of the original cost per boat therefor, and distributing the annual amount 50 percent to mileage and 50 percent to time, as the equal factors thereof;

8. That reasonable compensation to car owners requires that ownership costs be closely related to the original cost of cars and that rates productive of such compensation vary with original cost by factors proportionate to such cost;

9. That adjustments in the calculated costs of car ownership to reflect alleged deficiencies in the methods of accounting used by railroads to determine such costs for equity purposes in case of each other would not result in reasonable compensation to car owners; and

It, that reasonable compensation to car owners requires the payment by all railroads of the time and mileage rates set forth in table C, supra, from and after the effective date of the order in docket No. 33143.

Commissioner Walrath, being necessarily absent, did not participate.

It is ordered, That the proceeding in docket No. 33138 be, and it is hereby, discontinued.

It is further ordered, That the complaint in docket No. 33104, except to the extent to which the relief sought has been granted by order in docket No. 33143, be, and it is hereby, dismissed.

It is further ordered, That on and after October 1, 1963 the respondents in docket No. 33143 be, and they are hereby, required to maintain accurate records of both the days on-line of foreign per diem freight-train cars and the line-haul mileage over which they move each such car, and to pay to the owners of said cars the charges per day and per mile set forth in rate table 1 in this report; that this order shall continue in full force and effect until the further order of the Commission, and that the charges herein prescribed shall be paid for each day foreign cars are held; but nothing in this report and order shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

It is further ordered, That the order of the Commission dated October 3, 1963, which required respondents in docket No. 33143 to preserve all records, data and information underlying the reports filed by them in connection with said proceeding until further order, be, and it is hereby, canceled.

By the Commission.

APPENDIX

To facilitate the investigation in Docket No. 33145, the Commission incorporated in the order of investigation an order under section 20 of the act, requiring the filing of special reports by the carriers. The tentative form of these reports and the nature of the studies to be accomplished in preparing them were thereafter established as a result of conferences between attorneys and accountants for interested parties, a representative of the Association of American Railroads (AAR), and staff members of the Cost Finding Section, Bureau of Accounts, of the Commission. After a formal prehearing conference, at which copies of the proposed forms were distributed, all parties were afforded an opportunity to file verified statements for or against them, and thereafter to file rebuttal statements. After study of these statements and consideration of the contentions of the parties, the final form of the reports was determined by the Cost Section staff and served on all railroads. Only the class I line-haul roads were required to complete all of the forms. Other roads, including short lines, switching and terminal companies and electric railways, were required to complete only forms I, R-1A, and 10. The nature of the special studies which were made is indicated by the list of reporting forms, as follows:

Form A — Preliminary Survey of Equipment Repair Facilities.
1 — Special Study of Freight-train Car-miles and Car-days.
R-1A — Report of Per Diem Days and Payments.
2 — Special Study of Amounts Charged to Account 314 for Direct Wages Applicable to Freight-train Car Repairs.
3 — Special Study of Amounts Charged to Account 314 for Direct Materials Applicable to Freight-train Car Repairs.
4 — Summary of Special Study of Work of Freight-train Car Inspectors.
5 — Separation of Account 314 - Freight-train Cars - Repairs.
6 — Separation of Number of Cars, Original Cost, Equipment Obligations and Interest Thereon, Applicable to Freight-train Cars, between Per Diem Cars and All Other Freight-train Cars.
7 — Special Study of Switch Engine Hours Applicable to Freight-train Car Repairs.
10 — Non-revenue Freight Used in Equipment Repairs.
20 — Maintenance of Power Facilities for the Year 1960.
21 — Analysis of Certain Items Reported in Annual Report, Schedule 20 - Size of Freight Cars, for the Year 1960.
30 — Maintenance of Work Equipment.
31 — Maintenance of Miscellaneous Equipment.
I — Taxes Applicable to Freight-train Car Ownership.

9 - Analysis of Relation Between Investment in Shops and Enginehouses and Cost of Repairs Made in Such Facilities.
10 - Survey of Car Accounting Methods.
11 - Special Study of Accounting for Repacking of Journal Boxes.

The studies were accomplished during the calendar year 1960 and, during the course of that year, the Cost Section sent to the respondents a series of five documents of explanatory matter, based upon questions raised regarding the studies. Special arrangements were made to assign field examiners of the Bureau of Accounts to assist, and 34 such examiners were used for this purpose. During the study period they made 97 visits to 69 shops, trainyards, or railroad offices, located in 29 different States. Their reports were sent to the Cost Finding Section and, if any discrepancies appeared in the manner in which the carrier was conducting the special studies, correction thereof was requested. Certain of the forms were required to be filed for the first quarter of the year and, after audit thereof, and testing their results against 1959 reported data, any data which appeared of doubtful accuracy was referred to the particular carrier for further check.

On May 23, 1961, there was appointed an industry advisory committee on per diem costs consisting of representatives from the Baltimore and Ohio, Chicago, Burlington & Quincy, Illinois Central, New York, New Haven and Hartford, Long Island and Boston and Maine Railroads, and the American Short Line Railroad Association. The views of this group were sought, after conference with staff members of the Cost Finding Section, as to a proposed treatment of the deficiency of the reimbursement for the repairs of foreign per diem cars.

The special studies were accomplished, and reported on the prescribed forms, by 104 class I line-haul railroads. To the extent they were required to do so, reports were also received from other lines, as follows:

Class II line-haul railroads	22
Class I switching and terminal companies	27
Class II switching and terminal companies	45
Line-haul electric railways	3
Other electric railways	4
Total short lines	155
Class I line-haul railroads	104
Total reporting roads	259

From the information received as a result of these special studies, and the Annual reports of the carriers, together with certain data obtained from the Section of Valuation of the Bureau of Accounts, the Cost Finding Section made a series of cost computations, more specifically described below, which were subsequently received in evidence after extensive cross-examination of the staff officials responsible for their preparation. The Cost Section also prepared and offered in evidence a cost formula for consideration by

the Commission, designed to develop costs of per diem car ownership, should it be concluded that prescription of a formula was desirable.[14]

The results of the Cost Section's computations are presented in four tables which are designated Summary T-1, Summary MT-1, MT-2, and Summary MT-3.[15] Summary T-1 computes a single-factor, per diem unit cost for foreign per diem cars, in a manner similar to that heretofore employed by the AAR for the same purpose. It makes no allowance for age, value or type of cars, nor does it separate mileage costs from other types of costs. As computed, based upon 1960 figures, it indicates a unit cost of 249.503 cents per car per day.[16] This summary also computed a total and a daily average amount of deficiency in the reimbursement received by railroads for repairs made by them to cars of other lines amounting, using 1960 figures, to 11.417 cents per day.

Summary MT-1 separates unit costs for all per diem cars into those attributable to mileage, and those attributable to all other causes, the latter being designated as "time" costs. This was accomplished by separating ownership costs for all cars according to percentages for mileage and time, developed by the Valuation Section of the Bureau of Accounts. The total mileage costs were reduced to a unit cost per car-mile by dividing by the total line-haul and switching miles, after adjusting the latter by a factor purporting to reflect the greater repair costs engendered by switch movements. The time portion of the total costs was divided by the total active per diem car days for all railroads to develop the unit cost per active car day. The cost per mile thus developed, using 1960 figures, was 2.323 cents, and the cost per car day, 148.738 cents. These figures were not designed to directly ascertain car rental costs, since railroads do not maintain car records of switching mileages, but the figures were computed as a necessary step preliminary to the computations in the following summaries. Both summaries T-1 and MT-1 employ the original cost of freight cars and of freight car repair facilities as a basis for the computation of depreciation and interest on depreciated investment. Since one of the contentions in these cases involves the choice between use of original and reproduction costs, the summaries were each provided with an alternative calculation based upon the latter theory, by which they may be adjusted.

Summary MT-2 develops a unit daily cost for each of the class I line-haul railroads separately, and for class II roads by groups, as well as individually for the defendant railroads in docket No. 31358 and for the various different groups of reporting railroads in the special study program. In this summary the unit daily costs are computed to show the amount each railroad, or group of roads on an average, contributes to the costs of ownership of foreign cars on their lines taking into account the average mileage over which they move such cars. It differs from summary T-1 in that while still designed

[14] This report is designated by the Cost Section as Exhibit No. [illegible] It will be referred to hereinafter as Form B.

[15] The cost analysis supporting these summaries was made a part of exhibits of the Cost Section.

[16] The methods used by the Cost Section in developing [illegible] are set forth in more detail in Appendix [illegible]

to return to car owners their full costs of ownership, it refines the data so as to reflect differences between using lines measured by the way they make of the cars. Thus, for each railroad in this summary, the mileage cost developed in MT-1 is multiplied by the 1960 line-haul and equated switching car-miles of foreign per diem cars on the particular carrier, and the result (widely the per diem days paid for by that carrier in the same year, to reduce the mileage charge to a daily amount. Similarly, the time cost developed in summary MT-1 is divided by the particular carrier's daily average ratio of active foreign per diem cars on its line to total foreign per diem cars on its line, to produce unit time costs per total car day. Addition of the time costs, and the mileage costs reduced to a time basis, produces a daily unit charge applicable to each carrier, or group of carriers, by which the computation was made. The unit cost for all United States railroads computed by the method in MT-2, which is comparable to the unit cost of 245,903 cents per day in summary T-1, is 277 cents, made up of a mileage factor of 138 cents and a time factor of 139 cents. The difference results from giving effect to mileage, since foreign per diem cars run more miles per day than the combined average of all per diem cars. Like summary T-1, there is included in this computation no allowance for age, value or type of cars. The deficiency in user roads recovery of repair costs, developed in summary T-1, may be directly applied to the results reached by application of the MT-2 formula.

Summary MT-3 furnishes an alternative method of calculating the per diem car rental costs chargeable to individual user railroads, taking the mileage factor into account, but without computing a daily rate based upon each carrier's average operations. It is designed to develop, rather, time charges based upon the time each car is actually retained on the user road, and mileage charges based upon the mileage each car is actually moved by the user road. The factor for average switching costs is reduced to a daily amount and included in the time costs, resulting in a daily charge of 139 cents. The mileage cost of 2.33 cents developed in summary MT-1 is applied to line-haul mileage only. Use of this method requires that precise car records be kept showing, not only the days each foreign per diem car is on line, but the total miles it traveled by it.

At the hearings it appeared that other factors, such as the age, value, ~~type~~ of car, might deserve consideration. As a result, the cost section, utilizing the data and computations heretofore developed, made certain additional calculations to the extent possible within the limits of available information, tending to show the results of computing rent using each of the formulas, T-1, MT-1, MT-2, and MT-3, with depreciation and interest on depreciated investment computed on different car values, using both original and reproduction cost bases. Since the special studies did not provide for separation of repair costs, at extra, by ~~type~~ of car, it was examined that all costs other than depreciation and return would remain the same regardless of the value or age of the car, for convenience of comparison, the value brackets used in this computation are the same as employed in the CAM modified rates now in effect. Issues concerning the details and results of the cost section studies are considered and acted on in this report.

Per diem calculations by the AAR staff during the past 15 years have followed the same general pattern but have differed in their details with respect to each rate. Cost statistics for a recent 12 month period have been used in each instance and figures developed for repairs to cars, property taxes, depreciation on cars and on apportioned value of shops, enginehouses, power plants and shop and power plant machinery, interest on depreciated value of the same, apportioned cost of general expense, miscellaneous maintenance of equipment accounts, maintenance of shops, enginehouses, et cetera, interest on investment in stock of freight car material, interest on working capital, and deadhead haul cost of repair material. Each was divided by a car day divisor to develop a unit cost per day, and the results totaled. Generally the AAR staff calculated alternative costs, using different bases, such as ledger value, reproduction value, et cetera, leaving to the general committee and the board of directors of the AAR the decision as to which result should be submitted to the subscribers to the agreement for vote.

The car-day divisor has regularly been computed by taking the average of the ratios, for varying numbers of years, which total cars, less bad order and surplus cars on owners' lines, bore to total cars. This average ratio, applied to the number of days in the year for which the cost statistics were calculated, produced a figure referred to as "active car days per car per year", which was multiplied by the average number of cars in service during that year.[18] Prior to the calculations supporting the $2.40 rate, periods of from 5 to 15 years had been used. For all the rates now in issue, the average of car utilization ratios for the preceding 20-year period were used.

For the calculation of car repair expenses, the costs of the most recent year were used in calculations supporting the $2.75 and earlier rates. In the calculations supporting the $2.85 and multilevel rates, the repair expenses for the most recent 5-year period were averaged, after adjusting them to the wage and price level of the most recent year.

Depreciation on freight cars has always been calculated on a straight-line basis at the average of rates used by the carriers and approved by the Commission, except that calculations supporting the multilevel rates used a flat 5 percent rather than the average of 5.06 percent. Beginning with the calculations supporting the $2.40 rate, reproduction cost of the cars was used as the base for depreciation. Depreciation on apportioned value of shops, enginehouses, et cetera, has been based upon original cost in all calculations except that supporting the $2.40 rate, when the reproduction cost basis was employed.

Interest on investment has been calculated at 6 percent before taxes on both freight cars and repair facilities, using the average of depreciated original and reproduction costs as a base for the $2.40 rate and depreciated reproduction cost as a base for subsequent rates. Prior to the $1.90 rate, the calculations had differed, with depreciated original cost used as the base for interest on repair facilities.

TABLE NO. 20

Line No.	Item (1)	Use portion (percent) (2)	Time portion (percent) (3)	Weighting (4)
1	Car wheels—15-year life	100	0	.14
2	Axles (heat-treated)—20-year life	100	0	.08
3	Brake beams, heads, and shoes; couplers, dreft gears, et cetera	100	0	.13
4	Floors, sides, and ends	70	30	.22
5	Door units, tracks and mechanism	80	20	.11
6	Trucks, side frames, journal boxes and parts	100	0	.16
7	Painting, blasting, stenciling	70	30	.10
8	Wrecks and rough usage	100	0	.04
9	Weather	0	100	.03
10	Miscellaneous	50	50	.02
	Composite	79	21	1.00

As compiled, the use portion was intended to comprehend the impact of line-haul and switching activities and repairs made necessary by loading and unloading. The latter, included in item No. 4, were reassigned to the time factor by assuming that 50 percent of that item covered such damage, resulting in a decrease of some 8 percentage points in the use column,[123] and an equivalent increase in the time column. The weighting factors in column 4 for the first seven items were based upon data on file in the Engineering Branch. The last three were based on information contained in publications of the American Railway Car Institute, A.R.E.A. proceedings, and qualified by field information, conference of the Engineering Branch staff, and exercise of engineering judgment. All the percentage allocations in the first two columns are based upon engineering knowledge and judgment. As employed by the Cost Section, the portion assigned to "use" was treated as caused by movement of the car over miles of line-haul and switching operations.

Additional analyses of the causes of car repairs, and their relative effect, were conducted by 16 line-haul carriers,[124] having a total ownership of some 720,415 per diem cars in 1960. The analyses were made separately by each participating carrier, with respect to its own equipment and experience. Analysis was made of the average annual cost of replacements or repairs

[123] Fifty percent of the 70-percent use factor for item No. 4 is 35 which, multiplied by the weighting of .22 produces the 8-percent change in allocation. The product was rounded to the 70:30 ratio used by the Cost Section.

[124] Participating in this analysis were the Atchison, Topeka and Santa Fe Railway, Chesapeake and Ohio Railway, Chicago, Burlington and Quincy Railroad, Colorado & Southern Railway, Denver & Rio Grande Western Railroad, Great Northern Railway, Gulf, Mobile & Ohio Railroad, Illinois Central Railroad, Louisville and Nashville Railroad, Missouri Pacific Railroad, Nickel Plate Railroad, Norfolk & Western Railway, Northern Pacific Railroad, Seaboard Air Line Railroad, Southern Pacific Railroad, Texas & Pacific Lines, Union Pacific Railroad, Western Maryland Railroad, and Western Pacific Railroad.

to about 60 component parts of the cars considered, and distribution between those made necessary by line-haul mileage, switching, loading and unloading, and time, was accomplished by use of engineering judgment. The cars considered were 50-ton, 40 feet 6 inches, single-door, standard boxcars, and, for each carrier, that type of gondola and open-top hopper car representing their largest percentage of ownership. The results of each carrier's analysis were weighted according to its ownership of the type of car and combined totals obtained, from which the following distribution of repair causes was developed:

TABLE NO. 21

	Road-haul miles	Switching operations	Loading and unloading	Time
	Percent	*Percent*	*Percent*	*Percent*
Boxcar	37.205	21.095	26.184	15.516
Gondola car	40.486	22.432	21.305	15.777
Hopper car	36.580	21.019	16.114	26.287

If the above conclusions are averaged, the following result is produced:

TABLE NO. 22

Road haul miles	Switching operations	Loading and unloading	Time
	Percent		
38.090	21.515	21.201	19.193

And if line haul and switching operations be combined, as well as loading and unloading and time, for comparison with the 70 and 80 proportions employed by the Cost Section, the comparable figures thus developed are 59.6 and 40.4, or, in round figures, 60 and 40.

While there is a superficial appearance of similarity in these average figures, a comparison of the 16 underlying studies reveals that it is coincidental at best. Set forth below are tables showing, for box and hopper cars, the proportions of repair costs ascribed by officials of the reporting carriers to the four mentioned causal factors. For box cars the combined ratios of line haul and swtiching to loading and unloading and time vary from 74:26 to 45:55. For hopper cars they vary from 85:15 to 37:63.

TABLE NO. 23

HOPPER CARS

Carrier	Road haul	Switching	Load and unload	Time	Combined [1] ratio
NY, C&St. L-	35.428	21.138	19.748	23.686	57/43
GN	59.885	25.218	6.437	8.440	85/15
D&RG	51.163	27.076	10.808	10.953	78/22
MP	60.724	14.718	9.000	15.558	75/25
WMd	39.296	28.097	21.760	10.847	67/33
LN	46.560	20.693	5.051	27.426	67/33
ATSF	40.884	25.562	10.483	23.071	66/34
UP	34.889	29.246	20.207	15.657	64/36
ACL	43.086	19.516	16.415	20.984	62/38
SP	43.898	18.952	20.979	18.171	62/38
GM&O	40.185	20.786	8.668	30.361	61/39
Ill Cent	36.810	21.986	5.773	35.431	59/41
C&O	36.419	20.900	21.809	20.872	57/43
CB&Q	28.751	24.326	19.788	27.137	53/47
SAL	35.260	16.294	18.834	29.612	51/49
N&W	19.145	18.422	23.241	39.193	37/63
Spread					
N&W	19.145	----------	----------	----------	----------
MP	60.724	----------	----------	----------	----------
MP	----------	14.718	----------	----------	----------
UP	----------	29.246	----------	----------	----------
L&N	----------	----------	5.051	----------	----------
N&W	----------	----------	23.241	----------	----------
GN	----------	----------	----------	8.440	----------
N&W	----------	----------	----------	39.193	----------
GN	----------	----------	----------	----------	85/15
N&W	----------	----------	----------	----------	37/63

[1] The first figure is the percentage of line-haul and switching rounded off. The second is composed of percentages for loading and unloading and time, also rounded off.

TABLE NO. 24

BOX CARS

Carrier	Road haul	Switching	Load and unload	Time	Combined [1] ratio
GN	55.493	18.351	14.523	11.633	74/26
MP	54.065	15.253	12.584	18.098	69/31
L&N	40.800	22.890	21.981	14.329	64/36
D&RG	36.117	26.386	22.291	15.206	62/38
CB&Q	37.812	22.866	25.837	13.485	61/39
Ill Cent	40.516	20.836	24.143	14.505	61/39
ACL	37.467	22.572	19.985	19.978	60/40
SP	38.641	21.088	24.471	15.800	60/40
GM&O	35.650	23.183	27.660	13.507	59/41
NY,C&St. L-	36.207	23.196	28.389	12.208	59/41

See footnote at end of table.

BOX CARS—Continued

Carrier	Road haul	Switching	Load and unload	Time	Combined [1] ratio
WMd	30.451	25.567	34.844	9.138	56/44
C&O	32.722	21.914	28.175	17.289	55/45
SAL	35.260	16.294	18.834	29.612	51/49
ATSF	30.191	19.596	34.197	16.016	50/50
UP	21.868	26.672	36.825	14.534	48/52
N&W	27.944	16.844	31.780	23.432	45/55
Spread					
UP	21.868	----------	----------	----------	----------
GN	55.493	----------	----------	----------	----------
MP	----------	15.253	----------	----------	----------
UP	----------	26.672	----------	----------	----------
MP	----------	----------	12.584	----------	----------
UP	----------	----------	36.825	----------	----------
WMd	----------	----------	----------	9.138	----------
SAL	----------	----------	----------	29.612	----------
GN	----------	----------	----------	----------	74/26
N&W	----------	----------	----------	----------	45/55

[1]The first figure is the percentage of line-haul and switching rounded off. The second is composed of percentages for loading and unloading and time, also rounded off.

A witness for the New York Central testified that a substantially greater proportion of the repair costs should be attributed to line-haul mileage, with relatively little allocation to time and switching. This witness did not, however, testify as to the exact proportions he considered appropriate. The Pennsylvania Railroad conducted a separate analysis of records concerning its 50 foot box cars, 70-ton gondolas, and 70-ton hopper cars, in which the repairs were ascribed to time, road-haul mileage, switching, and loading and unloading, separated according to three assumed conditions; (1) cars held on tracks without movement, (2) cars in road train service but without loads moving 20,000 miles per year for box cars and 10,000 miles per year for gondolas and hopper, and (3) cars in similar road-haul service but loaded and unloaded 18 times per year. In round figures, the result of this analysis was a distribution of 72 percent of repair costs to road mileage and switching, 11 percent to loading and unloading, and 17 percent to time.

* * * * * * *

B.—*Time-mileage allocations-depreciation of freight cars.*—In its calculations of time and mileage charges, the Cost Section assigned 45 percent of depreciation to mileage and 55 percent to time. These proportions were developed by the Engineering Branch of the Section of Valuation, as were those for repairs, in connection with the computations underlying Rail Form A, and published in Statement 7-63, *Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs.* Like the similar distribution of

repairs, it is based on judgment of the staff officials, rather than on specific tests. In developing the various percentages, the depreciation was first separated into a "use" portion and a "time" portion. The former purports to isolate that portion of depreciation attributable to the wear and tear due to running operations, switching operations, and loading and unloading operations. Subsequently, the loading and unloading portion was transferred to "time" and the remainder assigned as the mileage element of depreciation. All other was assigned to "time." The latter also purports to include depreciation resulting from the action of the elements and obsolescence. The distribution of the depreciation charges between use and time was accomplished by separating the tare weight of the car into 43 principle parts and assigning a portion of the weight of each part to one or the other factor. It was assumed that the relative weight of the parts approximated the relative costs for replacement of the parts. In developing the proportions, the weighted figures as calculated for box cars, hopper cars, and gondola cars were averaged. The result was 46:54 which was rounded to 45:55 or use in the cost formula. An example of this process is shown in table 25 below.

TABLE NO. 25

Item—	Standard steel gondola car				
	Total weight	Use	Time	Use portion weight (column 2 x column 3)	Time portion weight (column 2 x column 4)
(1)	(2)	(3)	(4)	(5)	(6)
	Pounds	*Percent*	*Percent*	*Pounds*	*Pounds*
Running gear group:					
Wheels	4,822	100	0	4,822	0
Axles	3,920	100	0	3,920	0
Springs and snubbers	774	60	40	464	310
Journal box parts	618	80	20	494	124
Brake beams and heads	470	50	50	235	235
Brake shoes	178	100	0	178	0
Brake levers, connections, hangers, et cetera	255	50	50	128	127
Couplers	865	60	40	519	346
Coupler yokes	414	60	40	243	166
Coupler operating devices	47	80	20	38	9
Air brake equipment	663	50	50	332	331
Pipe, fittings and clamps	218	20	80	44	174
Levers, rods, supports, et cetera	472	50	50	236	236
Hand brake	144	50	50	72	72
Underframe group:					
Truck side frames and journal boxes	2,995	20	80	599	2,396
Truck bolsters, center plates and side bearings	2,196	20	80	439	1,757
Center sills	4,560	20	80	912	3,648
Bolsters-complete Under-	2,878	20	80	576	2,302
Cross bearers frame	2,718	20	80	544	2,174
Cross ties	1,100	20	80	220	880
Draft gear, followers and carriers	749	50	50	375	374
Draft gear keys and retainers	108	50	50	54	54
Center braces, plates, et cetera	693	20	80	139	554

TABLE NO. 25—Continued

Item—	Standard steel gondola car				
	Total weight	Use	Time	Use portion weight (column 2 x column 3)	Time portion weight (column 2 x column 4)
(1)	(2)	(3)	(4)	(5)	(6)
	Pounds	*Percent*	*Percent*	*Pounds*	*Pounds*
Body group:					
Side construction	12,591	50	50	6,295	6,295
End construction	2,389	50	50	1,195	1,194
Floor construction	7,505	80	20	6,004	1,501
Inside stake pockets	369	60	40	221	148
Handholds, ladders, sill steps, et cetera	190	20	80	38	152
Rivets and welding rod	838	50	50	419	419
Bolts, nuts, washers, cotters, et cetera	32	50	50	16	16
Paint, oil and waste	334	50	50	167	167
Miscellaneous	22	50	50	11	11
Total tare weight of gondola car	56,163	-------	---------	29,967	26,196
Composite for gondola	---------	[1]53	[1]47	[2]29,766	26,397

[1]"Use" portion computed by dividing the figure of 29,967 pounds from column 5 by the total weight of 56,163 pounds shown in column 2, percent equals 53.36. This figure was rounded off to 53 percent and used. The remaining portion (47 percent) was chargeable to time.

[2]Figure of 29,766 used, being 53 percent of total tare weight of 56,163 pounds.

Rail Form H–Summary T-1 docket No. 31358 cost calculation

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1953		
1	Freight-train car repairs	$679,141,264	123.865
2	Depreciation–cars	163,087,704	29.744
3	Depreciation–facilities	6,980,345	1.273
4	Property taxes–cars	64,212,598	11.712
5	Property taxes–facilities	3,433,615	.626
6	Payroll taxes	19,476,702	3.553
7	Return on investment–cars	201,930,867	36.829
8	Return on investment–facilities	10,756,924	1.962
9	Hire of freight cars	9,431,201	1.720
10	Return on working capital	3,978,983	.726
	Total	1,162,430,203	212.010
	1954		
1	Freight-train car repairs	554,890,318	126.055
2	Depreciation–cars	169,767,994	38.567
3	Depreciation–facilities	7,043,238	1.600
4	Property taxes–cars	63,311,400	14.382
5	Property taxes–facilities	3,438,457	.781
6	Payroll taxes	18,146,192	4.122
7	Return on investment–cars	199,041,096	45.216
8	Return on investment–facilities	10,875,323	2.470
9	Hire of freight cars	11,242,442	2.554
10	Return on working capital	3,296,897	.749
	Total	1,041.053,357	236.499
	1955		
1	Freight-train car repairs	603,286,136	104.959
2	Depreciation–cars	171,434,763	29.826
3	Depreciation–facilities	7,363,580	1.281
4	Property taxes–cars	67,140,565	11.681
5	Property taxes–facilities	3,668,064	.638
6	Payroll taxes	19,501,025	3.393
7	Return on investment–cars	203,184,954	35.350
8	Return on investment–facilities	11,062,659	1.924
9	Hire of freight cars	14,893,645	2.591
10	Return on working capital	3,179,292	.553
	Total	1,104,714,683	192.198
	1956		
1	Freight-train car repairs	644,379,078	106.545
2	Depreciation–cars	176,897,170	29.249
3	Depreciation–facilities	7,505,969	1.241
4	Property taxes–cars	72,150,484	11.930
5	Property taxes–facilities	3,771,113	.624
6	Payroll taxes	23,131,938	3.825
7	Return on investment–cars	222,568,063	36.801
8	Return on investment–facilities	11,259,737	1.862
9	Hire of freight cars	18,254,405	3.017
10	Return on working capital	3,496,749	.579
	Total	1,183,414,706	195.673

Rail Form H–Summary T-1 docket No. 31358 cost calculation–Con.

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1957		
1	Freight-train car repairs	$651,821,299	110.972
2	Depreciation–cars	192,614,649	32.792
3	Depreciation–facilities	7,642,434	1.301
4	Property taxes–cars	78,420,978	13.351
5	Property taxes–facilities	3,816,368	.649
6	Payroll taxes	23,785,664	4.049
7	Return on investment–cars	251,928,349	42.890
8	Return on investment–facilities	11,352,234	1.933
9	Hire of freight cars	21,226,295	3.614
10	Return on working capital	3,003,640	.511
	Total	1,245,606,910	212.062
	1958		
1	Freight-train car repairs	557,905,703	123.417
2	Depreciation–cars	207,207,427	45.837
3	Depreciation–facilities	7,573,445	1.675
4	Property taxes–cars	79,402,419	17.565
5	Property taxes–facilities	3,754,155	.830
6	Payroll taxes	21,964,085	4.859
7	Return on investment–cars	256,308,192	56.699
8	Return on investment–facilities	11,222,647	2.483
9	Hire of freight cars	25,839,462	5.716
10	Return on working capital	3,004,609	.664
	Total	1,174,182,144	259.747
	1959		
1	Freight-train car repairs	603,784,873	118.498
2	Depreciation–cars	210,695,645	41.351
3	Depreciation–facilities	7,846,928	1.541
4	Property taxes–cars	81,335,604	15.963
5	Property taxes–facilities	3,847,571	.755
6	Payroll taxes	26,470,719	5.196
7	Return on investment–cars	262,253,764	51.469
8	Return on investment–facilities	11,364,753	2.230
9	Hire of freight cars	32,890,216	6.455
10	Return on working capital	2,997,354	.588
	Total	1,243,487,429	244.046
	1960		
1	Freight-train car repairs	583,715,117	116.713
2	Depreciation–cars	214,654,958	42.700
3	Depreciation–facilities	8,023,021	1.596
4	Property taxes–cars	82,153,074	16.342
5	Property taxes–facilities	3,824,341	.760
6	Payroll taxes	28,140,156	5.597
7	Return on investment–cars	272,469,259	54.200
8	Return on investment–facilities	11,489,897	2.286
9	Hire of freight cars	48,929,073	9.733
10	Return on working capital	2,896,316	.576
	Total	1,256,295,212	249.903

Rail Form H–Summary T-1 docket No. 31358 cost calculation–Con.

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1961		
1	Freight-train car repairs	$542,296,733	114.025
2	Depreciation–cars	219,854,362	46.227
3	Depreciation–facilities	7,972,133	1.676
4	Property taxes–cars	78,986,170	16.608
5	Property taxes–facilities	3,686,054	.775
6	Payroll taxes	26,091,704	5.486
7	Return on investment–cars	274,381,398	57.692
8	Return on investment–facilities	11,569,671	2.433
9	Hire of freight cars	58,820,065	12.367
10	Return on working capital	2,778,174	.584
	Total	1,226,436,464	257.873
	1962		
1	Freight-train car repairs	560,508,850	122.210
2	Depreciation–cars	227,907,354	49.692
3	Depreciation–facilities	7,963,807	1.736
4	Property taxes–cars	76,570,423	16.694
5	Property taxes–facilities	3,518,132	.767
6	Payroll taxes	27,554,545	6.008
7	Return on investment–cars	281,404,864	61.355
8	Return on investment–facilities	11,502,266	2.508
9	Hire of freight cars	68,949,490	15.033
10	Return on working capital	2,847,599	.621
	Total	1,268,727,330	276.624
	1963		
1	Freight-train car repairs	550,322,495	108.968
2	Depreciation–cars	235,414,671	46.614
3	Depreciation–facilities	8,071,570	1.598
4	Property taxes–cars	71,238,098	14.106
5	Property taxes–facilities	3,385,171	.670
6	Payroll taxes	27,145,511	5.375
7	Return on investment–cars	273,339,558	54.123
8	Return on investment–facilities	11,645,943	2.307
9	Hire of freight cars	76,831,485	15.213
10	Return on working capital	2,665,587	.528
	Total	1,260,060,089	249.502
	1964		
1	Freight-train car repairs	564,752,370	111.906
2	Depreciation–cars	249,246,959	49.389
3	Depreciation–facilities	8,088,396	1.603
4	Property taxes–cars	81,165,680	16.083
5	Property taxes–facilities	3,257,518	.646
6	Payroll taxes	28,162,325	5.580
7	Return on investment–cars	320,427,320	63.492
8	Return on investment–facilities	10,557,090	2.092
9	Hire of freight cars	90,957,044	18.023
10	Return on working capital	2,750,841	.545
	Total	1,359,365,543	269.359

Rail Form H–Summary T-1 docket No. 31358 cost calculation–Con.

Line No.	Item	Aggregate ownership costs	Per diem unit cost (cents)
	1965		
1	Freight-train car repairs	$562,290,338	110.712
2	Depreciation–cars	266,697,638	52.511
3	Depreciation–facilities	8,143,383	1.604
4	Property taxes–cars	87,570,856	17.242
5	Property taxes–facilities	3,324,476	.655
6	Payroll taxes	29,179,129	5.745
7	Return on investment–cars	355,651,226	70.025
8	Return on investment–facilities	10,754,036	2.117
9	Hire of freight cars	119,334,451	23.496
10	Return on working capital	2,946,264	.580
	Total	1,445,891,797	284.687

Appendix F

SERVICE DATE
JUNE 7, 1968

ORDER
INTERSTATE COMMERCE COMMISSION
No. 33145*

RAILROAD FREIGHT CAR PER DIEM CHARGES

IN THE MATTER OF POSTPONING THE EFFECTIVE DATE OF ORDER

PRESENT: PAUL J. TIERNEY, Chairman, to whom the above matter which is the subject of this order, has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceedings, the judicial review action in the United States District Court for the District of Nebraska, entitled Civil Action No. 02981, *Union Pacific Railroad Company, et al. v. United States, et al.*, in which a preliminary injunction is sought to enjoin the effective date of the order entered herein on January 17, 1968, and the need for a postponement of said effective date in order to permit briefs to be filed and consideration thereof by the court in ruling on the pending motion for preliminary injunction; and good cause appearing therefor:

It is ordered, That the present effective date of the Commission's order entered herein January 17, 1968, be, and

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* Embracing No. 31358, Chicago, Burlington & Quincy R. Co., et al. v. New York, Susquehanna & Western Railroad Co., et al., and No. 34405, Southern Railway Company, et al. v. The Pennsylvania Railroad Company, et al.

it is hereby, postponed from October 1, 1968, until November 15, 1968.

Dated at Washington, D. C., this 29th day of May, 1968.

By the Commission, Chairman Tierney.

H. NEIL GARSON
Secretary

(SEAL)

Appendix G

SERVICE DATE
NOVEMBER 18, 1968

ORDER
INTERSTATE COMMERCE COMMISSION
No. 31358*

CHICAGO, BURLINGTON & QUINCY RR. CO., ET AL.
v.
NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

IN THE MATTER OF POSTPONING THE EFFECTIVE DATE OF ORDER

PRESENT: PAUL J. TIERNEY, Chairman, to whom the above matter, which is the subject of this order, has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceedings, the judicial review action in the United States District Court for the District of Nebraska, entitled Civil Action No. 02981, *Union Pacific Railroad Company, et al.* v. *United States, et al.*, in which a preliminary injunction was entered on November 7, 1968, enjoining the effective date of the order entered in Docket No. 33145 on January 17, 1968, as modified by order dated May 29, 1968, and the need for a further postponement in order to comply with the preliminary injunction entered in the court proceeding; and good cause appearing therefor:

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* Embracing No. 33145, Railroad Freight Car Per Diem Charges and No. 34405, Southern Railway Company, et al. v. The Pennsylvania Railroad Company, et al.

It is ordered, That the present effective date of the Commission's orders entered in Docket No. 33145 on January 17, and May 29, 1968, be, and it is hereby, postponed from November 15, 1968, until further order of the Commission.

Dated at Washington, D. C., this 13th day of November, 1968.

By the Commission, Chairman Tierney.

H. NEIL GARSON
Secretary

(SEAL)

Appendix H

SERVICE DATE
JUNE 16, 1969

ORDER
INTERSTATE COMMERCE COMMISSION
No. 31358*

CHICAGO, BURLINGTON & QUINCY R. CO. ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., ET AL.

IN THE MATTER OF ESTABLISHING THE EFFECTIVE DATE OF ORDER

PRESENT: VIRGINIA MAE BROWN, Chairman, to whom the above matter, which is the subject of this order, has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceedings, including the report of the Commission in 332 I.C.C. 176, the judicial reviews of the Commission's decision herein by the United States District Courts for the District of Massachusetts, *Boston and Maine Railroad, et al. v. United States and Interstate Commerce Commission*, Civil Action No. 56-1004-G, *Boston and Maine Corporation* v. *United States and Interstate Commerce Commission*, Civil Action No. 68-79-G and the District of Nebraska in Civil Action No. 02981, *Union Pacific Railroad Company, et al.* v. *United States*, et al., the opinions

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*Embracing No. 33145, Railroad Freight Car Per Diem Charges and No. 34405, Southern Railway Company, et al. v. The Pennsylvania Railroad Company, et al.

and judgments of said Courts on March 20, 1969 and May 28, 1969, sustaining the report and order of the Commission on further hearing decided January 17, 1968:

It is ordered, That on and after August 1, 1969, respondents in docket No. 33145 be, and they are hereby, required to maintain accurate records of both the days on-line of foreign per diem freight-train cars and the line-haul mileage over which they move each such car, and to pay to the owners of said cars the charges per day and per mile set forth in rate in rate table C in said report; that this order shall continue in force and effect until the further order of the Commission; and that the charges herein provided shall be paid for each day foreign cars are held but nothing in this report and order shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

Dated at Washington, D. C., this 12th day of June, 1969.

By the Commission, Chairman Brown.

H. NEIL GARSON
Secretary

(SEAL)

Appendix I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY, et al.,
Plaintiffs
vs.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants

CIVIL 02981
ORDER

Plaintiffs, Union Pacific Railroad Company, et al., have filed a motion for an injunction in which they seek to enjoin defendants from enforcing, during the pendency of the appeal from this Court's decision of May 27, 1969, to the Supreme Court of the United States, a certain order of the Interstate Commerce Commission. In order to minimize the possible injury to all parties it is hereby

ORDERED that defendants, their agents, servants, employees and attorneys, and all persons in active concert with them, be and they hereby are enjoined during the pendency of the appeal from enforcing the order of the Interstate Commerce Commission dated January 17, 1968, in proceedings identified as Docket Nos. 31358, 33145 and 34405, except so much of that order [as modified by orders of the Interstate Commerce Commission dated May 29, 1968, and June 12, 1969] which requires the respondents in Docket No. 33145 on and after August 1, 1969, "to maintain accurate records for both the days on-line for foreign per diem freight-train cars and the line-haul mileage over which they move each such car . . .": in the event this Court's judgment is affirmed by the United States Supreme Court, the Interstate Commerce Commission shall then

determine the effective date of resettlement, and the terms thereof, provided said effective date is not prior to August 1, 1969, unless otherwise directed to the contrary by the United States Supreme Court.

Dated this 7th day of July, 1969.

/s/ DONALD P. LAY
Circuit Judge

/s/ RICHARD E. ROBINSON
Chief District Judge

/s/ ROBERT VAN PELT
District Judge